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In the Supreme Court of the United States

OCTOBER TERM, 1991

MASSACHUSETTS WATER RESOURCES AUTHORITY
and KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF
MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution and the National Labor Relations Act (the "NLRA") foreclose a state authority, acting as the owner of a construction project, from enforcing a lawful prehire collective bargaining agreement negotiated by private parties as expressly authorized by the NLRA.

LIST OF INTERESTED PARTIES

Petitioner Massachusetts Water Resources Authority is a public entity created by an Act of the Commonwealth of Massachusetts in 1984. It has no non-wholly-owned subsidiaries.

Petitioner Kaiser Engineers, Inc., is a wholly-owned subsidiary of American Capital and Research Corporation, a publicly-traded Delaware corporation headquartered in Fairfax, Virginia. Kaiser has no non-wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The Massachusetts Water Resources Authority and Kaiser Engineers, Inc., by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals (App. 1a-48a) will be reported at 935 F.2d 345. The panel opinion of the court of appeals (App. 49a-71a) is reported at 135 L.R.R.M. (BNA) 2713. The opinion of the district court (App. 72a-83a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the Constitution, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . .

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) and (f), are reproduced at App. 143a-144a.

STATEMENT OF THE CASE

A. Introduction

Petitioner Massachusetts Water Resources Authority (the "Authority") is a state entity that provides water and sewer services to almost half the residents of Massachusetts. Under a federal court order entered to redress violations of the Clean Water Act, the Authority is building a $6.1 billion sewage treatment plant to clean up Boston Harbor. The Authority's private construction manager, petitioner Kaiser Engineers, Inc. ("Kaiser"), has entered into a lawful project labor agreement with the building and construction trade unions. The agreement is intended to establish terms and conditions of employment and to ensure harmonious labor relations throughout the ten-year life of the project.

In accordance with Massachusetts' competitive bidding laws, the Authority requests bids for work on the project. To implement the project labor agreement, the Authority required bidders to agree to adhere to the agreement for any work they were awarded on the project. The question presented is whether the NLRA preempts the Authority from continuing to impose such a requirement.

B. Factual Background

1. *The District Court Order to Build the Project*

In September 1985, the United States District Court for the District of Massachusetts ruled that the Authority, as successor to the Metropolitan District Commission, was liable under the Clean Water Act, 33 U.S.C. §§ 1251

et seq., for its predecessor's unlawful discharges of sewage into Boston Harbor. *United States v. Metropolitan District Commission*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20621 (D. Mass. 1988). Thereafter, the district court entered detailed remedial orders requiring the construction of a new $6.1 billion sewage treatment system for the metropolitan Boston area and other portions of eastern Massachusetts. App. 3a, 74a; *see also United States v. Metropolitan District Commission*, 757 F. Supp. 121 (D. Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991).

The district court imposed a strict schedule for the project, calling for new construction to begin by 1988 and to be completed by 1999. The court also ordered additional construction work to maintain and rehabilitate existing treatment facilities (located on Deer Island in Boston Harbor) pending completion of the new project. The court's numerous detailed orders require that construction proceed without interruption, making no allowance for delays from such causes as labor disputes.

2. *The Magnitude of the Authority's Task*

The sewage treatment plant now under construction in Boston is the largest public works project in the history of New England and one of the largest wastewater treatment projects in the history of the nation. At the height of construction, as many as 22 prime contractors and 100 subcontractors will be working simultaneously. They will employ as many as 2500 workers engaged in numerous construction trades.

All of this construction work will take place on a small, crowded site with limited means of access. Deer Island, the site of the new plant, has an area of only 215 acres and is located across a causeway at the end of a long, narrow peninsula extending into Boston Harbor. Because only a single narrow road winding through residential neighborhoods connects Deer Island to the mainland, use of the site was conditioned (by agreement with the host communities) upon transporting half the workers and all construction materials to Deer Island by water.

The economic reality confronting the Authority in the Boston area is that most of the workers at Deer Island will be union workers. Unionized contractors perform more than 75 percent of commercial construction work in the Boston area, and more than 30 unions represent employees in the building and construction trades. These unions typically have entered into separate collective bargaining agreements with employers, and the usual term of those agreements is substantially less than the projected ten-year life of the project. Accordingly, numerous collective bargaining agreements will expire during the project, and each expiration is a potential occasion for a strike or other permissible concerted action.

A strike by one union could disrupt the entire project. Other unions may choose to respect the picket lines of the striking union. Even if the other unions initially choose not to discontinue work in support of a strike, they may soon find themselves unable to proceed further with the project because of work that has not been completed by the strikers. In addition, given the size of the project and the variety of tasks to be performed, there is significant potential for jurisdictional conflict between unions regarding which workers should be assigned particular work. Because local collective bargaining agreements provide no mechanism for resolving such disputes, time-consuming proceedings before the National Labor Relations Board (the "Board") might be required before the work could go forward.

The geographical characteristics of the project site increase the potential for work disruption resulting from labor disputes. With only a single road and a single set of piers providing access to Deer Island, virtually any picketing is likely to cause delay. Indeed, in November 1988, when two union locals picketed to protest the use of a non-union subcontractor, all construction activity on Deer Island came to a virtual standstill. App. 4a n.2, 96a-97a; J.A. 277.[1]

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[1] "J.A." refers to the parties' joint appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

3. *The Project Labor Agreement Negotiated by Kaiser*

In April 1988, the Authority retained Kaiser to serve as construction manager for the project. J.A. 327. Kaiser is a private-sector company that is "an employer engaged primarily in the building and construction industry," within the meaning of Section 8(f) of the NLRA, 29 U.S.C. § 158(f). One of Kaiser's principal responsibilities was to assist the Authority in developing and implementing a labor relations policy to avoid disputes that might disrupt or delay the project.

Soon after it was retained, Kaiser recommended to the Authority that Kaiser negotiate a project labor agreement with the Building and Construction Trades Council of the Metropolitan District, its affiliated local unions, and other union entities. Kaiser based its recommendation on, among other things, the district court's demanding construction schedule, the geographical constraints on the project, the need to transport workers and materials to the project site by ferry, the duration of the project, the cost of delay, and the need to provide uniform rules regarding work hours, travel pay, and other matters. For all these reasons, Kaiser concluded that the Boston Harbor project was unacceptably vulnerable to labor disruption, including legal picketing, that was likely to occur in the absence of a prehire collective bargaining agreement. J.A. 328-30.

The Authority accepted Kaiser's recommendation and authorized Kaiser to negotiate a project labor agreement. The Authority did not participate in the collective bargaining process, but it did retain the right to approve any agreement negotiated by Kaiser. In May 1989, Kaiser completed its successful negotiation of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the "Agreement"). App. 107a-140a. By its terms, the Agreement was to apply to all construction work on the project.

The Agreement provided several important benefits for the Authority. First, and most important, it prohibited

all "strikes, picketing, work stoppages, slowdowns or other disruptive activity" for the duration of the project. Second, it established an expedited dispute resolution procedure (with judicial enforcement) for any disputes that might arise during the project, including a commitment to arbitrate any jurisdictional disputes between unions, with former Secretary of Labor John Dunlop acting as the arbitrator. Third, it created uniform work rules for the project with respect to such matters as hours of work, pay for travel to and from the work site, meal periods, and parking.

In exchange for these benefits, Kaiser agreed to recognize the participating unions as the exclusive bargaining representatives of construction employees on the project site and to honor local collective bargaining agreements on matters not covered by the Agreement. Among the provisions of local contracts expressly made applicable to the project were those governing wages, work rules and job classifications, and contributions to established employee benefit funds. All employees on the project had to be referred by local union hiring halls and to be subject to union security provisions in local collective bargaining agreements.

Kaiser successfully negotiated limitations on the reach of these provisions to protect the interests of firms that normally work non-union. All obligations under the Agreement were to apply only to the Boston Harbor project. In addition, Kaiser secured guarantees (a) that contractors would compete for contracts equally, regardless of any previous relationship (or lack of relationship) with any union, and (b) that no contractor would be obliged to enter into any other agreement or relationship with any union as a condition of doing work on the project. Kaiser also obtained an express assurance that union hiring halls would be operated in a nondiscriminatory manner, thus ensuring that workers would be referred for jobs on the project without regard to whether they were union members or would be represented by the union only on the Harbor project.

4. *The Authority's Implementation of the Project Labor Agreement*

The Authority approved the Agreement negotiated by Kaiser and proceeded to include the Agreement in the competitive bidding process. Specifically, soon after the Agreement was reached, the Authority incorporated an express reference to the Agreement into Bid Specification 13.1 in the Authority's requests for bids for work on the project. App. 141a-142a. As prescribed by Mass. Gen. L. ch. 30, § 39M(c), and ch. 149, § 44A, the bid specification required each bidder to "certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work." Following the negotiation of the Agreement, the Authority added the following provision:

> In the interests of such harmony and the long-term supply of skilled manpower, each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the . . . Agreement . . ., and will be bound by the provisions of that agreement in the same manner as any other provision of the contract.

Prospective contractors were thus required, in submitting their bids, to confirm their willingness to adhere to the Agreement in the event that their bids were selected.

C. *The District Court's Decision*

In March 1990, more than nine months after the Authority approved the Agreement and incorporated it into Specification 13.1, and after the Authority already had awarded contracts with an aggregate price of $550 million, respondents brought this action in the United States District Court for the District of Massachusetts. J.A. 11-139. The respondent contractors, though claiming to be ready, willing, and able to fulfill project contracts, alleged that they had not and would not bid on any such contracts because of the restrictive features of the Agree-

ment.[2] The complaint asserted claims of preemption under both the NLRA and the Employee Retirement Income Security Act ("ERISA") and violations of the Constitution, a variety of federal and state statutes, and Massachusetts common law.

Respondents moved unsuccessfully in the district court for a preliminary injunction to enjoin the Authority from enforcing Bid Specification 13.1 and "those portions of the Agreement which would require [respondents] to recognize or deal with any union or to adhere to any collectively bargained terms or conditions of employment." J.A. 141-224. The district court denied the motion in a written decision issued on April 11, 1990. App. 72a-83a. After describing the provisions and background of the Agreement, the court concluded that respondents had failed to demonstrate a likelihood of success on the merits with respect to any of the claims asserted. *Id.* at 76a-81a. The court also found that respondents would not suffer any immediate or irreparable harm in the absence of an injunction. *Id.* at 82a.[3] In rejecting respondents' claim of NLRA preemption, the district court stressed Congress' express recognition, in Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) and (f), of "the unique conditions which exist in the construction industry." App. 76a.[4]

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[2] Earlier, one of the respondent contractors had challenged the Agreement in a protest to the Commissioner of the Massachusetts Department of Labor and Industries. The Commissioner ruled that the Agreement was fully consistent with the Commonwealth's competitive bidding statutes. App. 94a-106a.

[3] The court emphasized that respondents had not bid on any project contract and that they were not precluded from bidding. Respondents conceded that in all events they would be required to pay at least the prevailing wage on the project, and the court therefore concluded that the alleged irreparable harm "appears limited to a violation of [respondents'] announced principle that they should not be required to recognize unions and union regulations that have not been designated by their employees." App. 82a.

[4] Soon after the filing of respondents' complaint, another contractors' association filed a charge with the National Labor Relations

D. The Decisions of the Court of Appeals

1. *The Panel's Ruling*

The court of appeals reversed and instructed the district court to "issue an order preliminarily enjoining enforcement of Specification 13.1." App. 49a-71a. In the court's view, respondents "present[ed] a portentous argument that there is a strong likelihood of their success on the merits" with respect to the NLRA preemption issue. *Id.* at 57a. The court did not reach any of respondents' other claims, and did not address any of the other factors relevant to the preliminary injunction inquiry.

In reaching this decision, the panel applied a *per se* rule that the states may never take action that affects the course of collective bargaining between private parties. The court based this inflexible rule on its reading of this Court's analyses of congressional intent in *Guss v. Utah Labor Relations Board*, 357 U.S. 1 (1957), *Machinists v. Wisconsin Labor Relations Comm'n*, 427 U.S. 132 (1976), and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1985). Having so read the cases, the majority held Specification 13.1 preempted as state action requiring adherence to a predetermined collective bargaining agreement, and it brushed aside as "irrelevant" the consideration that the Agreement itself was "a valid labor contract" specifically sanctioned by the NLRA itself. App. 69a.

2. *The Opinion of the* En Banc *Court*

After the district court entered the prescribed injunction on remand, the court of appeals granted rehearing *en banc*. App. 84a-85a, 86a. In granting rehearing, the

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Board, claiming that the Agreement violated the NLRA. The Board's General Counsel refused to issue a complaint. *See* App. 88a-93a (recommending dismissal of the charge on the ground that the Agreement is lawful under the construction-industry proviso of Section 8(e) and is a valid prehire agreement under Section 8(f)).

court asked the parties to discuss whether Specification 13.1 is "reasonably related to an important proprietary interest of the state, a legitimate response to state procurement constraints, or a legitimate response to local economic needs" and whether decisions finding state action preempted were distinguishable in this respect. *Id.* at 85a.

After further briefing and argument, the court of appeals adhered to its earlier ruling by a vote of three to two. App. 1a-48a. The majority opinion closely tracked that of the panel but also relied on the NLRA's express exclusion of the states and their political subdivisions from the statutory definition of "employer" to support its position that the NLRA's express authorization for certain "employers" to enter into prehire agreements did not validate the Authority's enforcement of the Agreement. The majority also concluded that, because it viewed Specification 13.1 to be a "direct regulation of the collective bargaining process" (*id.* at 30a), whether the Specification was " 'a legitimate response to state procurement constraints or to local economic needs' " was of no legal significance (*id.* at 26a, quoting *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 291 (1986)).

Chief Judge Breyer dissented, writing for himself and Judge Campbell, who had joined in the earlier panel decision. The dissent, rather than read *Machinists* and *Golden State* in the absolute terms adopted by the majority, closely analyzed Congress' intent in establishing the construction industry exceptions to the NLRA and discovered no indication that Congress had intended that a state construction project should be less advantaged by these provisos than a private project. To the contrary, the dissent explained, the Authority's enforcement of the Agreement was not explicitly forbidden by the NLRA and affected labor management relations only in a manner Congress had specifically authorized for private contractors. The legislative history of that statutory au-

thorization revealed no basis for treating public agencies differently from private contractors. App. 33a-41a. Moreover, the dissent continued, the Authority's status as a buyer of services in the marketplace rather than a regulator distinguished *Machinists*, *Gould*, and *Golden State*, in which the purpose of the state action found to have been preempted was to regulate. App. 43a-44a.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the preemptive effect of the NLRA that has not been settled by this Court. The court of appeals decided the question in a way that pays insufficient heed to this Court's oft-repeated admonition that preemption is not to be lightly presumed and that subjects state-owned construction projects to more rigid federal regulation than their private counterparts. The court did not defer to Congress' express recognition of the special circumstances that prevail in the construction industry, and it denied states the benefits Sections 8(e) and (f) of the NLRA accord to private parties, without any evidence that Congress intended to do so.

The court showed a readiness to interfere with state prerogatives when both this Court's prior decisions and the states' general exemption from regulation under the NLRA counsel a reluctance to interfere. By thus extending this Court's preemption decisions beyond the bounds of their reasoning, the court of appeals adopted a broad rule of preemption that will hamstring state agencies in many of their proprietary endeavors. More particularly, it will impede markedly the ability of state and local governments to carry out major construction projects in a manner that many believe to be crucial to completing them on time and on budget.

The particular construction project here at issue, which is of paramount public importance, is illustrative. The court-ordered cleanup of Boston Harbor offers substantial

environmental benefits to metropolitan Boston at a cost that imposes unprecedented financial burdens on its citizens. The freedom of the Authority to achieve those benefits by enforcement of the Agreement, the method it chose as best calculated to limit those burdens, is a matter of local concern of the highest order. The court of appeals unjustifiably deprived the Authority of that freedom.

The impact of this restriction on state power extends far beyond the Authority and Boston Harbor, for project labor agreements are an increasingly common tool for ensuring harmonious labor relations throughout the construction of large public and private projects.[5] The Boston Harbor project is one of a growing number of undertakings in which the project owners or their construction managers have found it advantageous to negotiate an agreement that will minimize the potential for strikes, picketing, work stoppages, and other forms of labor strife during the course of construction. Other prominent examples of projects built with such agreements include the Alaska Pipeline; Disneyworld; the Southern California Rapid Transit District heavy and light rail systems; the Baltimore Harbor Tunnel Rehabilitation Project; West Virginia University Hospital; airport construction in Chicago, Detroit, and Orlando; and public hydroelectric projects in Arizona and California.

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[5] Unless this Court grants the petition, it appears that the majority's reasoning will be replicated. The Eighth Circuit very recently enjoined a municipality from requiring contractors to enter into a project labor agreement. The court divided two-to-one, with the majority expressly relying upon the majority opinion here, and the dissenter, the dissent of Chief Judge Breyer. *See Glenwood Bridge, Inc. v. City of Minneapolis*, Aug. 8, 1991 BNA Daily Labor Report at D-1 (8th Cir. Aug. 2, 1991). That the two courts of appeals to have addressed the issue of state enforcement of project labor agreements both divided over its resolution emphasizes the need for the question to be settled by this Court.

Congress expressly authorized the use of prehire collective bargaining agreements by private construction contractors, and neither the NLRA nor its legislative history contains the slightest indication that Congress sought to make this option unavailable to public project owners. Because preemption is entirely a matter of congressional intent, the absence of any suggestion that Congress wished to prevent states, which are generally not subject to NLRA regulation, from using the same mechanism Congress went out of its way to provide for private construction contractors, who are subject to the Act, should have been dispositive. This Court should intervene to correct the court of appeals' unwarranted intrusion into the states' legitimate activities as purchasers of construction services.

Viewed more generally, this case presents a unique opportunity for the Court to provide needed guidance with respect to two fundamental issues of labor law preemption. First, the Court can establish the boundaries of the so-called *Machinists* preemption doctrine, *see Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), determining to what extent Congress' presumed intent to insulate collective bargaining disputes from state manipulation ousts state action that touches upon other aspects of labor relations. Second, with the lower courts having recognized that the Authority acted as a buyer and not as a regulator in promulgating Specification 13.1, the case presents squarely the question this Court specifically left open in *Wisconin Dep't of Industry v. Gould Inc.*, 475 U.S. 282 (1986), whether and to what degree the NLRA preempts actions taken by a state operating in a proprietary rather than a regulatory capacity. In both respects, the case provides an occasion for the Court to ground its labor law preemption doctrine more firmly in reemerging principles of federalism, considering in the light of those principles the appropriate roles of the state and federal governments in matters that touch upon labor relations.

I. THE COURT OF APPEALS' CONVERSION OF THE *MACHINISTS* DOCTRINE INTO A *PER SE* RULE OF PREEMPTION WAS UNPRECEDENTED AND UNWARRANTED.

The basic teaching of this Court on labor law preemption is well settled. To avoid interference with implementation of the NLRA by the Board, Congress is presumed to have forbidden the states to regulate conduct "arguably prohibited" or "arguably protected" by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). However, Congress is equally presumed to have permitted state regulation of such matters when the issue is of "peripheral concern" to the NLRA, or where the conduct in question is so "deeply involved in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 243-44. *See, e.g., Linn v. Plant Guard Workers*, 383 U.S. 53 (1965) (malicious libel actionable even if conduct arguably prohibited by the NLRA); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) (similarly, intentional infliction of emotional distress); *cf. Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (pre-*Garmon*; violent and coercive picketing actionable under state law).

In certain specific circumstances, this Court has held, *Garmon*'s "arguably prohibited/arguably protected" construct did not suffice to describe fully the preemptive effect Congress intended for the NLRA. More particularly, collective bargaining between an employer and the union representing its employees is the cornerstone of the NLRA, and much of the arsenal of this lawful economic conflict is neither prohibited nor protected by the statute. Accordingly, this Court added "self-help economic activities" to the categories of conduct the state is precluded from regulating. *Machinists*, 427 U.S. at 147. These activities are neither prohibited nor protected but presumed

to be part of the economic weaponry that Congress accorded labor and management. *Id.* Thus, in *Machinists*, this Court forbade Wisconsin from enjoining a union's concerted refusal to work overtime in support of collective bargaining positions. Then, reasoning directly from *Machinists*, in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1985), this Court held that Los Angeles' threat not to renew Golden State's taxi franchise unless it settled a strike with its employees' union improperly impaired the employer's use of "economic weapons Congress meant to be unregulable." *Machinists*, 427 U.S. at 147.[6]

Both *Machinists* and *Golden State*, it must be kept in mind, involved the state's regulatory intervention to influence the outcome of an ongoing, existing collective bargaining dispute between an employer and its union. Neither decision expressly restricts *Machinists* preemption to this context. Nor, however, does either expressly instruct that broader application of the doctrine is appropriate.

In fact, this Court has found *Machinists* preemption inapplicable to situations not involving an existing collective bargaining dispute. The Court rejected claims that the *Machinists* doctrine forbade the states to dictate some terms of collective bargining agreements. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (state may require mental health coverage in collectively bargained health insurance policies); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (similarly, plant closing benefits). This Court also held that Congress did not intend to prohibit the states from taxing employers to pay unemployment compensation to strikers, despite the un-

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[6] Although consistently referred to as "*Machinists* preemption," the principle was accepted at least as far back as the Court's decision in *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964) (state court may not enjoin secondary economic pressure neither prohibited nor protected by NLRA).

disputed impact on collective bargaining. *New York Telephone Co. v. New York Dep't of Labor*, 440 U.S. 519 (1979). Conversely, a state may deny unemployment compensation to otherwise eligible employees because they have financed the strikes that cause their unemployment. *Baker v. General Motors Corp.*, 478 U.S. 621 (1986). Moreover, despite the critical impact the hiring of "permanent replacements" during a strike may have on collective bargaining, this Court held that state law actions brought by such replacements concerning their employment status are not preempted. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

This Court's consistent refusal to extend *Machinists* beyond the narrow band of situations in which the state consciously seeks to deprive either an employer or its union of weapons in an existing labor dispute accords with the structure of federal labor law preemption. For outside *Garmon*, preemption has a limited function:

> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting only when it prevents the accomplishment of the purposes of the federal Act.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 756.

Here, the majority of the circuit court extended *Machinists* preemption to circumstances where this Court has never applied it. In so doing, the majority nowhere explained why the Authority's action "prevents the accomplishment of the purposes of the federal Act." To be sure, as the majority observed, the NLRA generally requires and permits an employer to recognize a union only when it is selected by a majority of the employer's employees, and the Agreement, in effect, could require aspiring contractors to recognize a union in the absence of such majority status. But all of the judges of the court of appeals recognized that the Agreement between Kaiser and the Council was a lawful prehire agreement ex-

pressly authorized by an exception to the general rule, an exception that permits precisely such non-majority status recognition.[7] App. 24a.

Congress created in Sections 8(e) and (f) of the NLRA specific exceptions to take account of unique conditions in the construction industry. 29 U.S.C. §§ 158(e) and (f); *see Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975); *NLRB v. Ironworkers*, 434 U.S. 335 (1978); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). Those special provisions form the basis for agreements such as that at issue here, and both the Board and the federal courts have upheld their validity repeatedly. *See, e.g., AGC v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979); *ABC of Kentuckiana v. Ohbayashi Corp.*, C.A. No. 87-38 (E.D. Ky. 1987); *Morrison-Knudsen Co.*, 13 NLRB Advice Mem. Rptr. ¶ 23,061 (NLRB-GC 1986). In fact, prior to the decision below, neither the Board nor any court ever had found a project labor agreement to violate federal law or national labor policy.

What happened here is what Congress might well have contemplated. Once Kaiser had determined that the circumstances it faced in managing the Harbor cleanup were precisely of the sort that prompted passage of Sections 8(e) and (f) and then had persuaded the Authority that the Agreement was a necessary response to those circumstances, Kaiser negotiated the Agreement with the Council. At that point, state "procurement constraints," *see Gould*, 475 U.S. at 291, left the Authority little choice as to the manner in which it would give effect to the Agreement. The Authority could attain the benefits of the agreement Kaiser had negotiated only by including in all

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[7] Indeed the Board's General Counsel already had rejected allegations that the Agreement was unlawful and dismissed unfair labor practice charges against Kaiser. App. 88a-93a.

of its solicitations for bids a specification requiring that contractors agree to observe the terms of the Agreement.[8]

Instead of explaining why *Machinists* would invalidate the Agreement because the project owner is a public authority, the majority applied the *Machinists* doctrine as if it were a *per se* rule of labor law preemption.[9] Thus, its analysis consists mainly of a repetition of the proposition fairly drawn from *Machinists* and *Golden State* that states are sometimes forbidden to make the same choices as private parties when those choices would affect private collective bargaining. App. 15a. What the majority failed to do was to proceed to the next step of the analysis: whether Congress *intended* to deprive the states of the

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[8] Massachusetts' competitive bidding laws, to which the Authority's Enabling Act explicitly subjects it, make clear that the competitive bidding process must be carried out by the awarding authority. Mass. Gen. L. ch. 30, § 39M; ch. 92 App., §§ 1-8(g); ch. 149, §§ 44A-44H; *Modern Continental Construction Co. v. Lowell*, 391 Mass. 829, 836, 465 N.E.2d 1173 (1984). Even if state competitive bidding laws had permitted the delegation of this task to Kaiser, which they do not, they require detailed bid specifications describing the work to be done. Mass. Gen. L. ch. 30, § 39M(b); ch. 149, § 44B(1); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 400 N.E.2d 1218 (1980). At the time the Authority retained Kaiser and began awarding construction contracts under the schedule established by the district court, the later portions of the project were not even designed, much less able to be described in detailed construction specifications.

[9] Perhaps the majority's *per se* approach can be explained by its heavy reliance on *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957). See App. 11a, 12a, 14a, 25a. *Guss* is a pre-*Garmon* decision that held that the states could not regulate the labor relations of very small employers even where the Board chose not to exercise its statutory jurisdiction over those employers. Congress immediately rejected the Court's assumption concerning its intent, *see* 29 U.S.C. § 164(c); 73 Stat. 541, and no court has since embraced *Guss* as enthusiastically as the court of appeals in the decision below. For a description of the reaction to *Guss* on the floor of the Senate, see Justice White's dissenting opinion in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 315-16 (1971).

right to act as challenged.[10] Instead, the majority assumed that state action that affects collective bargaining always impedes the accomplishment of congressional intent. But while it is quite clear why Congress would forbid a state to use its regulatory power to favor one side or the other in an existing labor dispute, it is a far different proposition to conclude that Congress intended to outlaw otherwise lawful prehire agreements when the customer for construction services is the state rather than a private party.[11]

Certainly, the text of the statute does not lead to this result. The majority pointed out that the state is not an "employer", 29 U.S.C. § 152(2), and therefore is not strictly within the terms of the construction industry exception in Section 8(f). App. 20a. But, as the dissent replied, since for the same reason the state cannot violate the prohibition in Section 8(a)(2) against recognizing a non-majority union, there would seem to be little reason why the drafters of Section 8(f) would place the state within an exception to a rule to which the state was not subject in the first place. App. 40a. More importantly, the reason states are not "employers" is that Congress chose to give states special freedom and flexibility by excluding them from the NLRA's regulatory regime. It is peculiar logic indeed to combine the express authoriza-

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[10] The majority's analysis makes real the concerns expressed in Chief Justice Rehnquist's dissent in *Golden State*:

> The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.

475 U.S. at 623.

[11] *Cf. Plumbers Etc., 298 v. County of Door*, 359 U.S. 354 (1959) (county entitled to protection of the NLRA when subjected to unlawful secondary pressure to discontinue use of non-unionized primary contractor).

tion of prehire agreements in Sections 8(e) and 8(f) with the special dispensation for states in Section 2(2) and conclude that Congress intended to impose *restrictions* on the states not applicable to other contractors or project owners.

Chief Judge Breyer's dissent engaged in precisely the analysis that the majority's *per se* approach avoided. In his words, "[i]nsofar as the [Authority's] purchasing decision affects labor-management relations, it does so only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized." App. 34a. For this reason, the dissent said, Specification 13.1 does not interfere with the free play of economic forces in a way that Congress did not intend to permit. Rather, when the Authority, "acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." *Id.* at 35a.

The dissent followed this Court's practice of reviewing legislative history to aid in determining legislative intent. *See, e.g., New York Telephone Co. v. New York Dep't of Labor*, 440 U.S. at 537-45. Carefully examining the legislative history of Section 8(f) and the construction-industry proviso to Section 8(e), the dissent found that that history confirmed its conclusion about the legality of the Authority's action. App. 37a-41a. Congress' reasons for authorizing prehire agreements in the construction industry, the dissent explained, "have nothing at all to do with the private or public nature of the general contractor." *Id.* at 37a. Instead, those reasons concern the nature of the industry itself—"the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry." App. 39a.

These conditions are "likely to remain the same whether a public or private contractor lets contracts for the work," and therefore, in the dissent's view, acting as "an ordinary private purchaser of construction services," the Authority did not frustrate the NLRA's statutory scheme when it used the Agreement. App. 40a, 41a.

Ultimately, it is the result reached by the majority that has frustrated the will of Congress. Absent any evidence that Congress forbade the state conduct challenged here, the court has carved out an unintended exception to the NLRA. The respondents gained a business advantage by precluding enforcement of a lawful prehire agreement solely because the construction customer is the state. No such exception appears in the NLRA. No legislative history supports such an exception. This Court should make clear that its prior decisions provide no basis for such a restriction on action by the states.

II. THE COURT OF APPEALS' EXTENSION OF THIS COURT'S PREEMPTION DOCTRINE TO PROPRIETARY RATHER THAN REGULATORY CONDUCT OF THE STATES IS UNPRECEDENTED AND UNWARRANTED.

This Court's preemption doctrine has focused exclusively on the states' *regulation* of labor relations. The avoidance of conflicting systems of regulation is the quintessence of that policy. "The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971). *See, e.g., Garmon*, 359 U.S. at 244 ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law"); *Brown v. Hotel Employees*, 468 U.S. 491, 503 (1984) (state regulation is preempted "[i]f the state law

regulates conduct that is actually protected by federal law").

Consistent with the basis of preemption doctrine, this Court has never extended labor law preemption to forbid conduct that is not regulatory in nature, but proprietary. Although *Gould* involved the use of the state's purchasing power, this Court's holding that a state may not punish repeat violators of the NLRA by barring them from state contracts involved classic *Garmon* preemption of state regulation. Congress, having erected a system of rights and remedies, is presumed not to intend the states to augment that system. *See* 475 U.S. at 287 (state prohibited from "adding a remedy to those prescribed by the NLRA"). Thus, *Gould* does not address the conduct of the state as buyer but as regulator. As the dissent below emphasized, this Court's unanimous opinion left open the issues whether and, if so, when federal law preempts state conduct that is truly of a proprietary nature:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon*, 359 U.S., at 243-244; see also, *e.g.*, *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. *See New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

> The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA.

475 U.S. at 291.

That Congress did not intend to regulate the proprietary behavior of the states is best evidenced by the NLRA's definition of "employer" to exclude states. 29 U.S.C. § 152(2). Congress has thereby expressed disinterest whether a state's employees are mandatorily unionized or not, whether a state permits its employees to strike or not, or, for that matter, whether a state affords its employees any of the rights granted private employees.

The only prior federal appellate decision to have treated this issue in detail found the NLRA's definition of the term "employer" persuasive in concluding that the NLRA did not preempt action by the state as purchaser. The Third Circuit, sitting *en banc* in *Amalgamated Transit Union, Div. 819 v. Byrne*, 568 F.2d 1025 (3d Cir. 1977), held that New Jersey's threat to withhold state subsidies from transportation companies that entered into collective bargaining agreements that included unlimited cost of living increases was not preempted by the NLRA. The court reasoned that *Machinists* preemption did not apply to state action where the state's "interest in the collective bargaining agreements is similar to that of any private purchaser of services which expresses an interest in the terms of a collective bargaining agreement under consideration by the provider of the services." *Id.* at 1029. Emphasizing the statutory exclusion of "states" from the NLRA's definition of "employer," the court observed that "to the extent that New Jersey is here acting like a private purchaser of services, Congress has explicitly exempted it from the proscriptions of the NLRA." *Id.*

The exclusion of the states and their instrumentalities from the sweep of the NLRA cannot be taken as anything other than a conscious judgment by Congress that the

states' own labor relations decisions are of no concern to federal law. Congress regularly makes judgments whether to subject the states to the same employment statutes as private entities. *Compare, e.g.*, 29 U.S.C. § 203(d) (FSLA); 29 U.S.C. § 630(b) (ADEA); 42 U.S.C. § 2000e (a), (b) (Title VII); 38 U.S.C. § 2021(1)(B) (veterans' reemployment) *with, e.g.*, 29 U.S.C. § 652(5) (OSHA); 29 U.S.C. § 2006(a) (polygraph statute). Indeed, inclusion of the states within the coverage of an employment statute may produce the single most controversial subject of congressional debate. *See Legislative History of the Equal Employment Opportunity Act of 1972*, pp. 1102-75.

The Board's expansive interpretation of Congress' state exclusion is instructive. To the extent that the states regulate pervasively the terms and conditions of their contractors' employment, the contractors substantially share in the states' statutory exclusion from NLRA coverage. *See, e.g., Correctional Medical Systems, Inc.*, 299 NLRB No. 95 (1990); *Southwest Ambulance Co.*, 295 NLRB No. 21 (1989); *National Transp. Service, Inc.*, 240 NLRB 656 (1979); *cf. PHP Healthcare Corp.*, 285 NLRB 182 (1987) (federal agency regulation). These cases reason that, if the state effectively dictates a private employer's labor relations policy, certification of a bargaining agent would be an exercise in futility. By this reasoning, the Board has effectively permitted the states to forbid unionization of their contractors. There is a stark contrast between the Board's willingness to carve an exception to the representational provisions of the NLRA as applied to private employers in order to accommodate Congress' exclusion of the states from the coverage of the NLRA, and the court of appeals' refusal to allow the Authority to enforce an agreement specifically permitted by the NLRA. Of course, the Board's understanding of the NLRA and the exclusion it grants to the states is entitled to substantial deference by the courts. *See NLRB v. E.C. Atkins & Co.*, 331 U.S. 398,

403-04 (1947) (Board entitled to "great respect"); *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 606 (1971).

Not only does the majority's extension of *Machinists* preemption to proprietary conduct run counter to the Board's interpretation of the NLRA, but it also contains no self-limiting rationale. The contrast between this case and *Golden State* is instructive. In *Golden State*, the City Council, which had no proprietary interest in the terms of the taxicab company's employment contract, exercised its unique authority over franchise renewals to influence the contract negotiations. Here, however, the Authority is acting strictly as a market participant, engaging in the same conduct, for the same economic reasons and with the same authority, as any similarly-situated private party. Had *Golden State* involved proprietary behavior by Los Angeles—for example, the cancellation of a city contract with Golden State to provide taxi service because of the reduced availability of taxis caused by the strike—there seems little likelihood that this Court would have found the city's action preempted. To hold such a cancellation preempted would allow the taxicab company to impose the costs of its private labor relations on the city. Yet nothing in the majority's reasoning would distinguish that case from this. The court of appeals' decision allows respondents to impose the costs and risks of their decision to work non-union on the Authority.

The Authority is expending billions of dollars of state funds to build a treatment plant designed to serve half the population of Massachusetts for half a century. To protect and enhance this massive investment by minimizing labor disharmony over more than a decade of construction, the Authority approved and applied the Agreement negotiated by a private construction employer and the construction trades. This Court should not permit the lower federal courts to use its own silence to deny the Authority the right to conduct its own affairs in a man-

ner that the NLRA expressly makes available to private employers.

III. PRINCIPLES OF FEDERALISM REQUIRE REASONED LIMITATIONS ON THE *MACHINISTS* DOCTRINE.

Beyond reining in the unwarranted doctrinal expansion that the court of appeals' decision threatens, this Court should examine the economic and governmental interests at stake here and what resolution of them advances our "system of dual sovereignty." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). The Authority is charged with a monumental task. The economic burden on its rate payers is both enormous and unsupported by the federal government that ordered its imposition. Moreover, to meet the district court's remedial orders, the Authority necessarily had to reconcile the peculiar geography of the site, the labor-management climate of the region, and the timetable the court imposed. The mechanism Kaiser devised to accomplish this reconciliation the court of appeals struck down, purporting to further Congress' intent.

But the federal interest served by the majority opinion is difficult to discern. Congress has sanctioned prehire agreements; the Authority's adoption of the agreement negotiated by Kaiser adds but one to the many others already in existence. The Authority told ABC's members they would have to enter into a prehire agreement to work on the Harbor cleanup; Congress already has told ABC, in effect, that its members would have to do so to work on many other construction projects.

The court of appeals' absolute subordination of extraordinary state interests to federal interests that are theoretical at best is impossible to square with this Court's most recent pronouncements about federalism. The court showed little appreciation of any of the values of federalism that this Court recently examined in *Gregory v. Ashcroft*. These virtues, as summarized by the Court—"a

decentralized government sensitive to . . . diverse needs . . .; opportunity for citizen involvement . . .; innovation and experimentation in government", 111 S. Ct. at 2399 —all are exemplified by the Authority and advanced by the Agreement. To the extent the majority noticed these values at all, it apparently dismissed them as "Balkanization." App. 69a.

Indeed, *Gregory*'s analysis may have direct application. Although this Court's preemption doctrine and its various rules of decision under the Commerce Clause such as that examined in *Gregory* have taken seemingly divergent paths, no apparent reason compels that divergence. During the same period that the Court was shaping its preemption doctrine, it also was seeking to determine the extent to which Congress had the power under the Commerce Clause to regulate the terms and conditions of employment of state employees. In 1976 this Court held in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the federal government cannot dictate the terms and conditions of employment for state employees working in a "governmental function." The rule proved difficult to apply, and the Court soon abandoned it in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The rule of law after *Garcia* seems to be that Congress has plenary power under the Commerce Clause to regulate the terms and conditions of employment of state and local employees.

The Court crystallized its analysis in *Gregory*. There, the Court construed the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, not to apply to state court judges. It reasoned as follows:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercise of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere con-

> gressional *ambiguity* would evade the very procedur for lawmaking on which *Garcia* relied to protec states' interests." L. Tribe, American Constitutiona Law § 6-25, p. 480 (2d ed. 1988).

111 S. Ct. at 2403. The Court therefore ruled that th proper ordering of federalism allowed Congress plenar power to regulate the employment rights of judges, bu declined to hold that Congress had exercised that powe absent a "plain statement" of that intent.

It would be most instructive, now, to consider thi case in light of *Gregory*'s analysis. Both involve the po tential exercise of plenary federal power; both therefor involve the question whether Congress intended to regu late the states' internal behavior. Both involve potentia federal interference with matters of critical local inte est, the qualifications of judges in *Gregory*, the extraor dinarily expensive rehabilitation of a polluted natura resource here. *Gregory* sensibly resolved the respectiv powers of the federal and state government. Congres had plenary power, but to exercise that power it had t do so clearly. Here, the majority held that Congress im plicitly intended to usurp state authority, notwithstan ing the weight of evidence to the contrary.

It is, no doubt, too late to apply directly *Gregory* "plain statement" rule to NLRA preemption. Howeve the *Gregory* analysis serves as a reminder that in federal system the ousting of state law by the feder legislature is not lightly to be assumed. This case pr vides an appropriate occasion for setting preemptio doctrine more squarely within the federal order as d lineated in *Gregory*: a system where the states opera as of right except where that operation directly impai some clearly articulated congressional policy.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 13, 1991

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,
PLAINTIFFS, APPELLANTS

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY,
ET AL., DEFENDANTS, APPELLEES

Appeal from the United States District Court
for the District of Massachusetts
[Hon. A. David Mazzone, *U.S. District Judge*]

Before
Breyer, *Chief Judge*,
Campbell, Torruella, Selya and Cyr,
Circuit Judges

Maurice Baskin, with whom *Carol Chandler*, *Mary L. Marshall*, *Stoneman, Chandler & Miller*, *Thomas J. Madden* and *Venable, Baetjer, Howard & Civiletti*, were on briefs for appellants.

Richard D. Wayne and *Hinckley, Allen, Snyder & Comen*, were on brief for Utility Contractors Association of New England, Inc., amicus curiae.

Ralph F. Abbott, Jr., *Jay M. Presser* and *Skoler, Abbott & Presser, P.C.*, were on brief for National Association of Manufacturers, amicus curiae.

James J. Kelley and *John M. Stevens*, with whom *E. Carl Uehlein, Jr.*, *Morgan, Lewis & Bockius*, *Arthur G. Telegen*, *Foley Hoag & Eliot*, *Catherine L. Farrell*, General Counsel and *Virginia S. Renick*, Senior Staff Counsel, were on joint brief for appellees Kaiser Engineers, Inc. and Massachusetts Water Resources Authority.

Donald J. Siegel, with whom *Mary T. Sullivan*, *Segal, Roitman & Coleman*, *Laurence J. Cohen*, *Victoria L. Bor*, *Sherman, Dunn, Cohen, Leifer & Yellig*, *Walter Kamiat* and *Laurence Gold*, were on briefs for appellee Building and Construction Trades Council of the Metropolitan District.

Scott Harshbarger, Attorney General and *Douglas H. Wilkins*, Assistant Attorney General, were on supplemental brief for the Commonwealth of Massachusetts, amicus curiae.

Bond, Schoeneck & King, *Sherburne, Powers & Needham*, *Raymond W. Murray*, *Robert W. Kopp* and *Anthony E. Battelle*, were on brief for Bechtel Corporation/Parsons Brinckeroff, Quade & Douglas, Inc., a Joint Venture, amicus curiae.

May 15, 1991

OPINION EN BANC

TORRUELLA, *Circuit Judge.* Plaintiffs-Appellants Associated Builders and Contractors of Massachusetts/ Rhode Island, Inc. ("ABC")[1] appeal the decision of the United States District Court for the District of Massachusetts denying ABC's request for a preliminary injunction. For the reasons stated below, we reverse this decision and remand for action consistent with our opinion.

I. THE FACTS

The Massachusetts Water Resources Authority ("MWRA") is a governmental agency authorized by the Massachusetts legislature to provide water supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts. Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, *United States* v. *Metropolitan District Commission*, C.A. No. 85-0489-MA (Mazzone, J.), the MWRA was ordered to meet a detailed timetable to carry out the clean-up of that body of water. This task, known as the Boston Harbor Clean-Up Project ("Project"), is estimated to involve $6.1 billion of public works over a ten year period. The means and methods of carrying out the Project are set forth in the MWRA's enabling statute, Mass. Gen. Laws ch. 92, app. §§ 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control and supervision over all aspects of this project.

In the spring of 1988, the MWRA retained Kaiser Engineers, Inc. ("Kaiser") as its program/construction

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[1] Also its national association and five individual contractors.

manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor, or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work and other limited or emergency situations.

Another important function of Kaiser is to advise the MWRA on the development of a labor relations policy which will maintain worksite harmony, labor-management peace, and overall stability during the ten-year life of the Project. The MWRA had already experienced work stoppages and informational picketing at various sites [2] and was concerned that, because of the scale of the Project and the number of different craft skills involved, it was vulnerable to numerous delays thus placing the court-ordered schedule in jeopardy and subjecting the MWRA to possible contempt orders. This concern was enhanced by the geographic location of the existing and proposed treatment facilities which makes them vulnerable to picketing and other concerted activity.[3]

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[2] In November of 1988, two labor unions picketed the Project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site. This is a well recognized method of maintaining continuity of work in the construction industry. Other threats were made to disrupt the work, but no other significant disruption actually occurred.

[3] At Deer Island access to the site was by a single two-lane road passing through crowded Winthrop streets, and next to the existing Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Trades Council such as those representing maritime workers.

The above circumstances led Kaiser to recommend to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Building and Construction Trades Council and affiliated labor organizations[4] ("Trades Council"), in an effort to arrive at an agreement which would assure labor stability over the life of the Project. Any agreement would be subject to review and final approval by the MWRA.

The MWRA accepted Kaiser's recommendations and in early May 1989 Kaiser proceeded to meet with negotiating teams from the unions, including the Trades Council. The Master Labor Agreement was the result of their negotiations. After review by the MWRA staff, and upon its recommendation, the MWRA Board of Directors on May 28, 1989 adopted the Master Labor Agreement as the labor policy for the Project and directed that Specification 13.1 be added to the bid specification for all new construction work. Specification 13.1 provides that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ["the Master Labor Agreement"] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the [Trades Council] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract. A copy of the agreement is attached and included as part of these Contract Documents . . .

The Master Labor Agreement establishes as "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." It is the duty of Kaiser on behalf of

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[4] Thirty-four in all.

MWRA to "monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto." The parties state the need to meet the "specified and limited time frames" established by the district court's order in the Boston Harbor Clean-up case. Also agreed to are binding methods for the settlement of "all misunderstandings, disputes or grievances which may arise [and] . . . the Union, agree[s] not to engage in any strike, slowdown or interruption of work [or] the [employers] . . . to engage in any lockout."

Most importantly, the Trades Council is recognized "as the sole and exclusive bargaining representative of all craft employees," and its hiring halls are made the initial and principal source for the Project's labor force. All employees are subject to the union security provisions of the agreement which require that they become union members within seven days of their employment. Employees may seek redress for their grievances only through the recognized labor organizations, and the contractors are bound by the Trades Council member unions' wage and benefit provisions and apprenticeship program. The contractors are required to make contributions to various union benefit trust funds and to observe the unions' work rules and job classifications.

The Master Labor Agreement became "effective [on] May 22, 1989, and shall continue in effect for the duration of the Project construction work." As previously indicated, the Project is expected to take ten years to complete.

II. PROCEDURAL BACKGROUND

ABC is an organization composed of individual construction contractors and trade associations representing over 18,000 "merit shop" (i.e., non-union) construction industry employers. On March 5, 1990, ABC brought suit in the United States District Court for the District of

Massachusetts against the MWRA, Kaiser and the Trades Council, seeking injunctive relief against enforcement of bidding Specification 13.1. ABC claims that, as applied to its membership, Specification 13.1 effectively bars them from seeking and obtaining any bids in this multi-billion dollar, ten-year endeavor. ABC alleges irreparable injury and damages from what it perceives to be a violation of various federal and state statutes. These contentions, and the district court's treatment of them, can be summarized as follows:

(1) *Preemption under the NLRA.* ABC alleged that the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq.*, prohibits the MWRA from interfering with the labor negotiations process, specifically arguing that requiring employers to accept the terms of a collective bargaining agreement with a union that has not been designated as the bargaining agent by employees is illegal. The district court held that Section 8(e) and (f) of the NLRA[5] permit such restrictive agreements in the construction industry and that even if the Master Labor Agreement were to affect NLRA-regulated conduct, such impact must be considered against the manifest importance of the Boston Harbor clean-up. "The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages." The court ruled that the Master Labor Agreement was lawful under the circumstances.

(2) *Preemption under ERISA.* ABC claimed that since the Agreement required employers to contribute to trust funds, the Agreement in effect regulated the terms and conditions of employee benefit plans covered under Section 514(c) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(c). The court disagreed, holding that the Agreement is not so broad and only applies to a single discrete project and thus does not contravene ERISA.

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[5] 29 U.S.C. §§ 158(e) and (f).

(3) *Equal protection and due process clause allegations.* ABC claimed that the bidding procedures discriminate against non-union contractors and effectively preclude such contractors from bidding, thus violating the equal protection and due process clauses. These claims were also rejected by the district court, which ruled that non-union contractors are not a protected class, that bidding procedures were open to all contractors, and that since ABC had failed to make any bid as of yet, a constitutionally protected right was lacking.[6]

(4) *The Sherman Act claim.* ABC alleged that the Master Labor Agreement and Specification 13.1 constitute a conspiracy among appellees to reduce competition in the construction industry by effectively precluding non-union contractors, in violation of the Sherman Act, 15 U.S.C. § 1. Below, the court reiterated that appellants were not excluded from the bidding process and furthermore, since the Master Labor Agreement "serves legitimate business, and public purposes" there was no anti-trust violation. Moreover, the district court found that the MWRA, as a state entity, is immune from an anti-trust claim and that Section 8(e) of the NLRA along with labor's non-statutory anti-trust exemption under the Sherman Act protect Kaiser and the Trades Council as well.

(5) *State law claims.* The district court rejected ABC's state law violations claim, ruling that the Massachusetts Public Bidding statute, Mass. Gen. Laws ch. 30, § 39M and ch. 149, §§ 44A-L, specifically required that the winning bidder must furnish labor that can work in "harmony with all the other elements of labor employed or to be employed on the work." It further ruled that there was no interference with business relationships because no relationships existed as of yet.

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[6] Analogous state claims were also rejected.

Thus, the district court denied a preliminary injunction holding that, first, the appellants were not likely to succeed on the merits. Second, ABC had not shown immediate and irreparable harm because it had not been awarded a contract; even if it had, it would have an adequate remedy at law. Third, the balance of harm to the appellants was outweighed by the harm to the appellees, since the appellees would suffer intolerable delays, disruptions, and increased costs in the Boston Harbor clean-up without Specification 13.1. And last, issuing an injunction would adversely affect the public interest in the swift clean-up of Boston Harbor.

ABC appealed the denial of the preliminary injunction to a panel of this court. In its opinion, the original panel reached only the issue of preemption under the NLRA, finding (as do we) that issue dispositive of the appeal. In its petition for rehearing *en banc*, the Trades Council raised a new point relevant to NLRA preemption: whether Specification 13.1 should escape preemption because it was necessary to efficient completion of the clean-up. The Trades Council, joined by the MWRA and various amici in their briefs on rehearing, maintain that because the Specification was enacted to further proprietary, rather than regulatory, interests, it falls within an exception to the preemption doctrine allegedly articulated by the Supreme Court in *Wisconsin Dep't of Indus.* v. *Gould*, 475 U.S. 272 (1986). We determined that this issue merited closer scrutiny by the court as a whole, and issued an order requesting the parties to address the following isuses:

> Is the MWRA's insistence upon the labor conditions at issue reasonably related to an important proprietary interest of the state, a legitimate response to state procurement restraints, or a legitimate response to local economic needs?
>
> If so, is that insistence therefore lawful, *Wisconsin Dep't of Industry* v. *Gould*, 475 U.S. 282, 291 (1986)

and *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), being distinguishable in this respect?

III. STANDARD OF REVIEW

On review, we will reverse the district court's denial of a preliminary injunction where the denial is an abuse of discretion, or is based upon a clear error of law, or where the district court's findings of fact are clearly erroneous. *See, e.g., Massachusetts Ass'n of Older Americans* v. *Sharp*, 700 F.2d 749, 751-52 (1st Cir. 1983); *Maceira* v. *Pagán*, 649 F.2d 8, 15 (1st Cir. 1981); *see also General Electric Co.* v. *New York State Dept. of Labor*, 891 F.2d 25, 26 (2d Cir. 1989) (reversing denial of preliminary injunction on ERISA preemption grounds); 7 Moore, *Federal Practice and Procedure* ¶ 65.04[2] (2d ed. 1987). Where, as here, appellants are asking for a mandatory injunction which will change the *status quo ante* during the pendency of litigation, we will take into account the exigencies and circumstances of the situation. *See Massachusetts Coalition of Citizens with Disabilities* v. *Civil Defense Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

To be entitled to injunctive relief a party must establish that it has a likelihood of success on the merits, that it will suffer immediate and irreparable harm if relief is not granted, that such harm outweighs any harm to the non-moving party, and that the public interest will not be adversely affected. *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *Lancer* v. *Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir. 1985). The balancing of interests shifts in plaintiffs' favor when a strong likelihood of success on the merits is shown. *SEC* v. *World Radio Mission, Inc.*, 544 F.2d 535, 541-42 (1st Cir. 1976).

IV. DISCUSSION

In our opinion, appellants have made a strong showing that they are likely to succeed on the merits. In so holding, we do not reach their entire array of arguments, because in our view, their main argument ultimately carries the day.

A. *Preemption under the NLRA*

In order to analyze preemption under the NLRA, we must first examine a bit of the Act's evolution. Since first enacted in 1935, the NLRA "has empowered the National Labor Relations Board 'to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce.'" 29 U.S.C. § 160(a). "By this language, and by the definition of 'affecting commerce' . . . Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 3 (1957). *See also* 29 U.S.C. § 152(7).[7] Thus, in the area of labor relations there is "not only a general intent to pre-empt the field but also . . . [the] inescapable implication of exclusiveness." *Guss*, 353 U.S. at 10. In *Guss* the Supreme Court went so far as to carry that principle to the point of creating a no-man's land, in which no jurisdiction existed on behalf of state authorities to intervene in labor relations matters covered by the Act notwithstanding the Board's refusal to exercise dominion over such disputes. It should be noted that, although *Guss* involved unfair labor practices, the Act uses substantially similar language regarding the representation procedures estab-

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[7] 29 U.S.C. § 152(7):

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

See also NLRB v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 325-26 (1940) (construing "affecting commerce").

lished thereunder, and therefore the principle established by *Guss* is of equal application to representation matters.[8]

The situation created by *Guss* led in 1959 to the amendment by Congress of Section 14 of the Act, allowing for state intervention in labor disputes affecting commerce in which the Board has specifically declined to exercise jurisdiction.[9] Prior to that amendment, as is discussed in *Guss*, 353 U.S. at 6-7, a state could only intervene in a labor dispute affecting commerce if the Board had entered into a cession agreement pursuant to Section 10(a) of the Act,[10] and then only if the state statute was consistent with a corresponding provision in the Act.

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[8] *See* 29 U.S.C. §§ 141(b), 151, 152, 157, 159. For example, § 159(c)(1) provides that:

> Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation *affecting commerce* exists shall provide for an appropriate hearing upon due notice . . . (emphasis supplied).

[9] 29 U.S.C. § 164:

> (c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[10] 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall

Intervention in labor matters affecting commerce today is thus limited to cession agreements by the Board with the states under Section 10(a) of the Act, or specific declinations by the Board to intervene pursuant to Section 14(c) of the Act. There is a third category, also under Section 14 of the Act,[11] which allows the states to legislate to prohibit union shop agreements.

It is a textbook proposition that, under the supremacy clause of Article VI of the Constitution,[12] the "supreme" congressional law supersedes or preempts state law. Preemption occurs not only when there is an outright conflict between the federal scheme and the state requirement, but also when congressional action is an implicit barrier—*e.g.*, when state regulation interferes unduly

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not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

[11] 29 U.S.C. § 164(b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[12] U.S. Const. art. VI, para. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

with the accomplishment of congressional objectives. Congressional legislation in an area in which a state seeks to regulate does not necessarily preclude all state action. Nor does the fact that there is no explicit federal-state conflict or congressional statement of intent to bar state authority inescapably rule out a finding of preemption. *Cf. Guss*, 353 U.S. at 10.

> The question in each case is what the purpose of Congress was [in legislating] . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Rice v. *Santa Fé Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (citations omitted).[13]

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[13] The dissent's definition of preemption, *see* slip op. at 39 (Breyer, C.J., dissenting), although correct as far as it goes, is unduly restrictive. Omitted is any mention of preemption "where the pervasiveness of the federal regulation precludes supplementation by the States, [or] where the federal interest in the field is sufficiently dominant." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *French* v. *Pan Am Express, Inc.*, 869 F.2d 1, 2 (1st Cir. 1989).

The Supreme Court has recognized two types of federal preemption of state and local government action in the field of labor law. First, the Supreme Court has prohibited the states from regulating activities "which are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). Second, the Court has held that state and local governments are prohibited from regulating activities which Congress intended to be left unrestricted by any governmental power. *Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers* v. *Wisconsin Emp. Comm.*, 427 U.S. 132, 140 (1976).[14]

While both forms of preemption are implicated by this appeal, we believe that the present case is most heavily influenced by the Supreme Court's holdings in the *Golden State Transit Corp.* cases, which relied and expanded upon the *Machinists* doctrine. *See Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) [*Golden State I*]; *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444 (1989) [*Golden State II*]. While there are differences between the *Golden State* cases and the present case, we think the similarities have greater salience.

In *Golden State I* the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the franchise on settlement of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. The Supreme Court ruled that the city's action in conditioning renewal of the franchise on settlement of the

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[14] In *Machinists*, the Court had found unlawful a state commission's prohibition against union refusals to work overtime during collective bargaining negotiations. 427 U.S. at 148-49.

labor dispute was preempted by the Act. The Court stated, in language which we believe is adaptable to the present controversy:

> Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, . . . unless such restrictions presumably were contemplated by Congress. . . . "[T]he crucial inquiry regarding pre-emption is the same: whether, 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' "

Golden State I, 475 U.S. at 614-15 (citations omitted). The city's insistence on a settlement was preempted by the Act because it " 'entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced.' " *Id.* at 615-16 (citations omitted). This was so because "[t]he NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616.

In *Golden State II*, where the issue involved the availability of compensatory damages, the Supreme Court reiterated with even greater firmness the NLRA's subordination of state interests to the principle of unfettered collective bargaining. The Court declared that the *Machinists* rule—shielding the collective bargaining process from government interference—was not designed "to answer the question whether federal or state regulations should apply to certain conduct. Rather, it is more akin to a rule that denies *either* sovereign the authority to abridge a personal liberty." *Golden State II*, 110 S. Ct. at 451-52 (emphasis added). The Court concluded that the *Machinists* preemption rule "is a guarantee of free-

dom for private conduct that the state may not abridge." *Id.* at 452.

In the present case, the state's intrusion into the bargaining process is pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here *eliminates* the bargaining process altogther. Inasmuch as regulation of this conduct [15] seems central to federal labor relations, we do not see how it could be considered peripheral under the *Garmon* analysis. *Garmon*, 359 U.S. at 243. *Compare Belknap, Inc.* v. *Hale*, 463 U.S. 491, 509 (1983) (third parties hired as strike replacements had state-law causes of action based on misrepresentations by the employer); *Automobile Workers* v. *Russell*, 356 U.S. 634, 635 (1958) (state court jurisdiction over common law tort action against union for mass picketing upheld); *Youngdahl* v. *Rainfair*, 355 U.S. 131, 132 (1957) (same re injunctive power to prevent interference with free use of streets); *Automobile Workers* v. *Wisconsin Emp. Rel. Board*, 351 U.S. 266, 274 (1956) (same re power to enjoin violent union conduct); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 657 (1954) (state may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways); *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Board*, 315 U.S. 740, 749 (1942) (same).

To be sure, there may be instances where the "regulated conduct touch[es] interests so deeply rooted in local

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[15] The fact that the state here has acted through its bidding regulations rather than its general law is irrelevant to our analysis, as "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State I*, 475 U.S. at 614 n.5 (quoting *Garmon*, 359 U.S. at 243).

feeling and responsibility that, in the absence of compelling congressional direction, [a court] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. The district judge, in a commendable attempt to harmonize the irreconcilable conflicts presented by this difficult case, reasoned that even if the Master Labor Agreement "were to have some impact on NLRA-regulated conduct, that impact must be considered in the light of important state interest, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense." In effect, the court held that this public purpose sanitized its constitutional shortfalls. While we do not totally fault the court's efforts in this respect, nor disagree as to the importance of the Boston Harbor clean-up, it cannot be said that congressional concern for a uniform, national labor policy as embodied in the NLRA, is entitled to secondary deference. Importantly, the regulated conduct here is the labor relations/bargaining process itself. Such processes have been termed by Congress as paramount to national, not local, interests. We, ourselves, have recognized as much. *See General Electric Co.* v. *Callahan*, 294 F.2d 60, 67 (1st Cir. 1961) (holding that a state labor board's interference with a labor contract negotiation "conflict[ed] with the national policy of free and unfettered collective bargaining"), *cert. dismissed*, 369 U.S. 832 (1962). Moreover, in at least one respect, Specification 13.1 seems not to further, but rather to trample, what the Massachusetts legislature has determined to be the Commonwealth's interest. Massachusetts has enacted a Fair Competitive Bid Law which requires that the Commonwealth obtain through open competition the lowest responsible and eligible bid for public construction projects. Mass. Gen. Laws ch. 30, § 39M, and ch. 149, § 44A-L. Although we do not reach the state law arguments raised by ABC, we do note that this apparent conflict undercuts the MWRA's position that Specification 13.1 furthers peculiarly local interests.

There are few areas in which local interest can be more legitimately exercised than in protecting the public from financial hardship caused by fiscally irresponsible persons using the state highways. Yet the Supreme Court invalidated a state statute whose purpose was resolution of such a dilemma because it concluded that it conflicted with the Federal Bankruptcy Act. *Pérez* v. *Campbell*, 402 U.S. 637, 656 (1971). The Court rejected the argument that the purpose of the state law, rather than its effect on the operation of federal legislation, should govern its validity. Even if the state claimed to be concerned with promotion of highway safety, such a statute could not stand if it conflicted with the federal scheme: "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Id.* at 652.

Although the local concerns that led to the promulgation of Specification 13.1—"labor harmony during [the] life . . . [of] . . . this critical project"—are laudable, they conflict with paramount federal law and must therefore fall. We should add that we are in any event somewhat skeptical of the *pax industrial* which the Master Labor Agreement utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that this contract is no bar to rival, or for that matter, anti-union, activity. *See* 29 U.S.C. § 158(f), *last proviso.*

Appellees contend that, had the Master Agreement been entered into directly between the state agency and the unions, it would be unassailable, because "[t]he National Labor Relations Act leaves regulation of the labor relations of state and local government to the States." *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 223 (1977). Of course, if the MWRA were the actual employer of the

Project laborers, the NLRA would be totally inapplicable as States are excluded from the definition of "employer." 29 U.S.C. § 152(2).[16] The state's substantial participation in the Project, however, is not enough to alter its status from regulator to employer, nor does any party seriously claim such a relationship. There are insufficient indicia of an employer/employee relationship between the MWRA and the laborers.[17] Rather, the state is in its common role of a third party purchaser. If the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would likely swallow the rule.[18]

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[16] 29 U.S.C. § 152(2) states in part:

> The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . .

[17] The distinction between an employee and an independent contractor under the NLRA is to be determined by application of common law agency principles. *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57, 60 (1st Cir. 1981). Under this standard, the relationship between the construction workers and the MWRA is a contracting, not an employment, relationship. For example, the MWRA does not have the right to control the laborers' performance, nor does it pay their salaries, provide pension or other benefits, or make FICA payments on their behalf.

[18] Nevertheless, there may be situations in which a contractual relationship between the state and a private entity is such that the state would be considered an employer for the purposes of the NLRA. *See, e.g., Board of Trustees of Memorial Hosp.* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980) (holding that where a private employer who has contracted to provide services to an exempt political subdivision does not retain sufficient control over the employment relationship to engage in collective bargaining, the exempt subdivision is deemed the true employer); *Compton* v. *National Maritime U. of America*, 533 F.2d 1270 (1st Cir. 1976) (noting that a private contractor that performs services for an exempt governmental agency may be deemed to share the exemption).

Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees thus totally displacing the NLRA, not just in this Project, but also statewide, and, if the practice were to become generalized, nationally. Indeed, an anti-union state government could allow only non-union employers to bid on state projects, if the state-as-employer argument is taken to its extreme.

As discussed herein, a state is not included in the definition of employer. Normally, employers cannot enter into pre-hire agreements. Congress created an exception to this prohibition for *employers* in the construction industry, as such term is defined in the Act. To suggest, as is done by the dissent, *see* slip op. at 51-52 (Breyer, C.J., dissenting), that a *state*, by definition not an employer within this statute, somehow reverts to the status of statutory employer for purposes of this exception is fancy judicial footwork at its nimblest. The facts provide a dose of reality that not only undercuts the dissent's imaginative analysis of the legislative history of the construction industry exceptions, but also destroys its premise that the state should be treated as a private employer. Indisputably, the MWRA is not an employer under either the law, 29 U.S.C. § 152(2), or the facts of this case.

Thus, absent some principled basis for reading an exception into the legal framework, a matter which we discuss *post*, we believe that either because of its regulation of matters protected by § 7 of the Act (*e.g.*, the mandatory recognition of the Trades Council), *Garmon*, 359 U.S. at 245, or because of its direct intrusion into the collective bargaining process, *Golden State I*, 475 U.S. at 614-15, Specification 13.1 frustrates the purposes of the Act and is, therefore, preempted.

B. *Sections 8(e) and (f) of the Act—The construction industry exemption*

Appellees argue, and the district court in effect ruled, that the provision of Sections 8(e) and (f) of the Act validate the Master Labor Agreement "in the context of the unique conditions which exist in the construction industry."

Section 8(e) of the Act [19] makes it an unfair labor practice for an employer and a union to enter into what is commonly referred to as a "hot cargo" agreement. Under a "hot cargo" agreement, generally, the employer binds itself not to do business with another employer or person. This type of agreement developed out of situations in which unions did not want their members to be working or handling "struck" goods. Section 8(e), however, contains a limited exemption for the construction industry, "relating to the contracting or subcontracting of work to be done at the site of the construction." Thus "hot cargo" agreements are legal, to this circumscribed extent, in the construction industry.

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[19] 29 U.S.C. § 158(e) states in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

Section 8(f) of the Act [20] creates another exception for the building and construction industry by allowing certain actions, which would otherwise be prohibited as unfair labor practices, by employers and unions in that line of work. Thus a construction industry employer may enter into a so-called "pre-hire" agreement with a union, *e.g.*, a collective bargaining agreement wherein the union's representative status is immaterial and which in fact is usually entered into prior to the hiring of any employees. Furthermore, such an agreement may contain a union shop provision requiring membership in the union seven days after hiring, 29 U.S.C. § 158(f)(2),

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[20] 29 U.S.C. § 158(f):

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

which would otherwise be illegal;[21] a requirement that the employer notify the union of job openings giving the labor organization an opportunity to refer qualified job workers, 29 U.S.C. § 158(f)(3); as well as a condition establishing minimum training or experience qualifications and area-wide seniority. 29 U.S.C. § 158(f)(4).

A construction industry labor contract entered into under the exceptional provisions of Section 8(f) is not, as specifically stated in the final proviso of that section, a bar to a petition for election, be it by a rival union,[22] by the employer[23] or by the employees themselves.[24] If the employees elect a rival union as their bargaining agent, neither the winning union nor the employer are required to assume the 8(f) contract. If the employees reject the 8(f) contracting union as their bargaining agent and do not choose another bargaining agent, the contract is totally void because one of the contracting parties is disqualified.

It is apparent from the above that under the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract. *See Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-66 (1983). That conclusion, however, is irrelevant to the preemption issue at hand. Appellants do not challenge the validity of that agreement; they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing of the Master Labor Agreement as a condition of the award of an MWRA bid. On said issue, Sections 8(e) and (f) have no bearing, except as reinforcement for appellants' preemption arguments. It is clear, both from

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[21] The usual provision is 30 days. *See* 29 U.S.C. § 158(a)(3).

[22] 29 U.S.C. § 159(c)(1)(A).

[23] 29 U.S.C. § 159(c)(1)(B).

[24] 29 U.S.C. § 159(e)(1).

their nature and history, that Congress extensively debated and considered these controversial provisions before their enactment. *See generally*, 1959 U.S. Code Cong. & Admin. News, p. 2318 *et seq.* It is unlikely that Congress intended to leave open to Balkanization by the states such core areas as unfair labor practices and collective bargaining, which are the matters inescapably arising from Sections 8(e) and (f) problems. Indeed, nowhere in the legislative history is there any indication that a state would be allowed to impose this type of regulation. The history of Sections 8(e) and (f) discusses private employers only; the silence as to permitted state regulation is deafening. In enacting these exceptional provisions, Congress occupied the field to the exclusion of such local regulations as are exemplified by Specification 13.1. *See Guss*, 353 U.S. at 10. Although the Master Labor Agreement is a valid contract pursuant to Sections 8(e) and (f) of the Act, Specification 13.1 unduly interferes with the area of labor negotiations which Congress clearly intended to leave unregulated under the same statute: the collective bargaining process. *See Golden State I*, 475 U.S. at 614-16.

C. *Proprietary or regulatory interest*

In *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282 (1986), the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts as preempted under the *Garmon* doctrine. *Gould*, 475 U.S. at 291. The state argued that it should not be restricted by the Commerce Clause when it acts as a market participant. The Court rejected this argument, noting first, that the state was functioning more as a regulator than as a market participant, and second, that the exception to the Commerce Clause might be broader than state action allowed under the NLRA. *Id.* at 289-90. The Court based its analysis on the differing purposes served by the Commerce Clause and the NLRA: whereas

the Commerce Clause contains " 'no indication of a constitutional plan to limit the ability of the States themselves to operate in the free market,' . . . [t]he NLRA, in contrast, was designed in large part to 'entrust administration of the labor policy for the Nation to a centralized administrative agency.' " *Id.* (citations omitted).

In concluding the *Gould* opinion, the Court explored, but did not define, the boundaries of its holding:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-44; *see also, e.g., Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. *See New York Tel. Co.* v. *New York State Labor Dept.*, 440 U.S. 519 (1979).

Gould, 475 U.S. at 291. Having opened this door, however, the Court firmly closed it on the Wisconsin rule at issue, stating that "[w]e are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States." *Id.*

Appellees submit that this language creates an exception to the preemption doctrine arising out of the distinction between a state's interest as proprietor versus its interest as regulator. Where a spending decision such as Specification 13.1 is animated by the exigency of doing

business rather than the regulation of labor relations; where the measure's effect on labor relations is incidental to a legitimate and necessary proprietary purpose; that measure, argue appellees, is saved from preemption by the supposed *Gould* exception. As a subsidiary proposition, appellees also contend that the MWRA's action would be lawful under Sections 8(e) and (f) were it undertaken by a private employer, and that there is no basis under the NLRA to treat a state more harshly than a comparably situated private party.

We can dispose of the latter contention quite briefly before moving to the more troublesome principal point. First, Congress is perfectly capable of distinguishing between states and private parties when it chooses, and it has so chosen here. Sections 8(e) and (f) refer to "employers." The Act states that the term "employer" "shall not include . . . any State or political subdivision thereof." 29 U.S.C. § 152(2). Thus it is clear that the MWRA is not encompassed by Sections 8(e) and (f), and its conduct cannot be compared with what might be acceptable conduct by a private employer.[25]

Moreover, the Court itself has underscored the state/private distinction, in the very case appellees use to support their proprietary interest argument. The *Gould* opinion states:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far

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[25] There are, of course, federal statutes other than the NLRA which treat the actions of states and private parties differently. *See, e.g.*, the Sherman Antitrust Act, 15 U.S.C. §§ 1, 7 (prohibiting certain private conduct but exempting the states); the Securities Act, 15 U.S.C. § 77(c) (exempting government securities from the Act's provisions); the Civil Rights Act, 42 U.S.C. § 1983 (prohibiting certain state conduct only).

> from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. The NLRA, moreover, has long been understood to protect a range of conduct against state but not private inteference. The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Gould, 475 U.S. at 290. Thus it is plain that the private employer comparison merits little weight. The MWRA is an arm of the state, and its actions must be judged accordingly.[26]

Moving to the issue of proprietary interest, we find that we are ultimately unpersuaded that such an exception, if it exists at all, applies in this case. Other than the dicta in *Gould*, the Supreme Court has never articulated —much less applied—a proprietary interest exception. Moreover, the cases cited in *Gould* do not support an exception for the situation at hand. *Belknap* v. *Hale*, 463 U.S. at 509, is one of a line of cases permitting state tort law remedies to coexist with the NLRA. *See supra* at pp. 20-21. These cases merely indicate application of the *Garmon* analysis allowing state action in "peripheral" areas. *Garmon*, 359 U.S. at 243. For an example of a "spending determination" addressing "state procurement constraints" or "local economic need," *Gould*, 475 U.S. at 291, the Court cited *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U.S. 519 (1979). In that case, the Court found no preemption where the state sought to impose a mandatory minimum benefit (unemployment compensation) through a law of general ap-

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[26] The dissent appears to suggest that basing a distinction on whether or not an actor is an arm of the state is overly technical. *See* slip op. at 51 (Breyer, C.J., dissenting). We disagree, and point again to the statutes cited *supra* n.25, as well as the entire Bill of Rights.

plicability. *Id.* at 545-46.[27] *See also Fort Halifax* v. *Coyne*, 482 U.S. 1, 22 (1987) (upholding Maine statute requiring employers to provide severance pay); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 755 (1985) (upholding state statute requiring certain minimum health benefits to be included in employee health plans). As this court has noted, because such a statute "'neither encourages nor discourages the collective bargaining processes that are the subject of the NLRA,' it is 'a valid and unexceptional exercise of the State's police power.'" *Beckwith* v. *United Parcel Service, Inc.*, 889 F.2d 344, 349 (1st Cir. 1989) (quoting *Metropolitan Life Ins.*, 471 U.S. at 755, 758). Plainly, the same cannot be said of Specification 13.1, which mandates adherence to a particular contract with a particular group of labor unions, in lieu of the collective bargaining process.

Our reading of the *Gould* "exception" is that it largely restates the *Garmon* proposition: Some state interference into the collective bargaining process is permitted if it, first, is "peripheral" to federal labor policy, or, second, pertains to matters "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 243-44. As we

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[27] In *New York Tel.*, a plurality of the Court held that New York's unemployment benefits statute was not preempted despite the fact that it directly affected the economic balance between striking workers and struck employers. Justice Stevens, joined by two others, argued that because the unemployment statute was a benefits program of general applicability rather than a law directly targeting private conduct in the labor-management realm, it was more difficult to infer congressional intent to preempt it. *See New York Tel.*, 440 U.S. at 533 (plurality opinion). Five Justices disagreed that this distinction impacted the preemption inquiry. *See id.* at 549-50 (Blackmun, J., concurring), 57-58 (Powell, J., dissenting). Justices Blackmun and Powell argued that when a law directly affects labor-management relations, whether the statute is of general applicability or is particularly directed at regulating labor-management relations is of little moment. By analogy, then, when a regulation such as Specification 13.1 directly affects labor-management relations, whether the regulation's purpose is proprietry or regulatory should be relatively insignificant.

have stated *ante*, at p. 20, Specification 13.1 is a direct regulation of the collective bargaining process. Thus it can neither be termed "peripheral" nor "local." To be sure, the Boston Harbor clean-up is a matter of great local interest. It is not the clean-up, however, which is being regulated; collective bargaining is being regulated, and that cannot be.

At any rate, *Garmon* is only one avenue of preemption under federal labor law—albeit one which most likely applies to Specification 13.1. This opinion, however, has rested largely on the *Machinists* doctrine as articulated in *Golden State I*. It is noteworthy that in *Golden State I*, once the Court had determined that the City of Los Angeles had directly interfered with the collective bargaining process, it expressly declined to consider the nature and extent of the City's interest in resolving the labor dispute. *Golden State I*, 475 U.S. at 617-18 and n.8.[28] Yet the City would seem to have a strong and legitimate interest in ensuring the adequacy of its transportation system, *see id.* at 620 (Rehnquist, J., dissenting)—at least tantamount to the MWRA's interest in ensuring speedy completion of the harbor clean-up. We can only conclude that the lesson of the *Golden State* cases is that, where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether "proprietary" or otherwise, cannot justify the interference.

D. *Other Allegations*

In view of our ruling on the issue of preemption of Specification 13.1 by the Act, it is unnecessary for us to reach the other questions raised by the appeal. *See Lane* v. *First National Bank of Boston*, 871 F.2d 166, 168 (1st Cir. 1989).

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[28] The Court also did not reach the question of whether the *Garmon* "peripheral" exception even applies to a *Machinists* case. *Id.* at 618 n.8.

V. CONCLUSION

Specification 13.1 unduly restricts aspects of the labor-management relationship intentionally left unregulated by Congress and is thus preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* The decision of the district court is reversed. The district court, at the direction of this court in its original panel opinion in this case, has already issued a preliminary injunction against enforcement of Specification 13.1. That injunction remained in force during the pendency of the rehearing *en banc.* Therefore, we simply order that the preliminary injunction continue in effect during the further proceedings in this case.

Reversed and remanded. Costs to appellants.

BREYER, *Chief Judge*, with whom CAMPBELL, *Circuit Judge* joins (dissenting). The Commonwealth of Massachusetts, acting through the Massachusetts Water Resources Authority, will let contracts for more than $6 billion of construction work on the Boston Harbor Clean-Up Project. The MWRA requires, as a condition for a contract award, that the winning bidder abide by (and insist that its subcontractors abide by) a prehire bargaining agreement. That agreement requires the contractors and subcontractors to recognize the Building Trades Council as bargaining representative for all craft employees, to hire workers through the hiring halls of the Council's constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the Council's wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the Council unions' benefit funds. In return for the MWRA's promise to insist that contractors sign the agreement, the Council has promised the MWRA labor peace throughout the 10-year life of the construction project.

Were the industry here involved other than the construction industry, we could understand how the majority would consider this agreement a rather intrusive effort by a state agency to control the labor relations of subcontractors with their employees. The construction industry, for labor-relations purposes, however, is special. As all parties concede, the special construction-industry provisions in §§ 8(e) & (f) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) & (f), would permit the MWRA, were it a *private* party letting construction contracts, to act just as it wishes to act here. Indeed, general contractors in the construction industry often enter into prehire agreements of this sort. The only question in this case is whether the NLRA forbids the MWRA, because it is a state agency, to do what the Act explicitly permits a private contractor to do.

The NLRA does not contain any language that *explicitly* forbids a state, acting like a general construction contractor, from entering into a prehire agreement. Rather, the majority believes that the Act *implicitly* forbids it from doing so, *i.e.*, that the Act implicitly removed, or preempted, a state's power to act as the MWRA has acted here. Applying general principles of pre-emption, the majority must therefore believe (1) that the MWRA's action "conflicts with" the Act, (2) that it "frustrate[s] the federal [statutory] scheme," or (3) that it appears "from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states." *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978) (setting forth general conditions for pre-emption); *see also Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). We do not see how permitting a state agency, when acting like a general contractor, to make labor agreements just like those that private general contractors make, could "conflict with" the NLRA, "frustrate" the NLRA "scheme," or otherwise interfere with the regulatory system that the NLRA creates. We therefore dissent.

The Supreme Court has described two related sets of concerns that led Congress, implicitly, to forbid certain kinds of state activities. First, Congress intended to grant the National Labor Relations Board *exclusive* authority to determine whether § 8 of the Act prohibits or § 7 of the Act protects certain particular labor-related activities and to provide remedies for violations. Thus, (with a few narrow exceptions) a state may not regulate activities that the Act arguably prohibits or protects. *See San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244-45 (1959). Nor may it add to, or subtract from, the remedies that the federal scheme provides. *See Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 498-99 (1953).

Second, Congress intended to "leave some activities unregulated and to be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976). Thus, states may not regulate "economic warfare between labor and management," *New York Tel. Co.* v. *New York State Labor Dep't*, 440 U.S. 519, 530 (1979), when doing so significantly interferes with the "intentional balance" that Congress contemplated "between the uncontrolled power of management and labor to further their respective interests." *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 614 (1986). They may not, for example, award damages for peaceful secondary picketing, *see Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 258 (1964), or forbid a union's concerted refusal to work overtime, *see Machinists*, 427 U.S. at 149, for, in both instances, Congress intended "to preserve" those "means of economic warfare for use during the bargaining process." *New York Tel.*, 440 U.S. at 530.

The majority finds this second kind of pre-emption present here. It concludes that the MWRA has regulated the relationship between labor and management in a way that upsets the "balance" between labor and management that Congress intended. In our view, however, the special construction-industry exceptions in the Act itself show that Congress did not intend pre-emption. Insofar as the MWRA's purchasing decision affects labor-management relations, it does so only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized. Moreover, the relevant Supreme Court cases in this area reinforce our view that the MWRA's actions do not "conflict with" or otherwise "frustrate" the NLRA or its objectives.

1. *The Act's Construction-Industry Exceptions.* The construction-industry exceptions of the NLRA make clear that the conditions that the MWRA wishes to impose do

not represent an effort by the state to tilt the economic playing field, that is to say, to interfere with the "free play of economic forces" between subcontractors and their employees, in a manner that Congress did not intend to permit. Rather, Congress defined the playing field in the construction industry (but not elsewhere) in a special way: it permitted a general contractor to insist that subcontractors enter into prehire agreements of the very sort here at issue. Thus, when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.

To understand how this is so, consider how the construction-industry exceptions work within the context of the Act. The Act, in §§ 8(a), (b) and (e), 29 U.S.C. §§ 158(a), (b) & (e), lists a set of "unfair labor practices." For example, it says in §§ 8(a)(1) and 7 that employers may not interfere with their employees' efforts to organize collectively or discriminate against union members, *id.* §§ 158(a)(1) & 157; it says in § 8(b)(4) that labor organizations may not engage in secondary boycotts, *id.* § 158(b)(4); and, it requires in §§ 8(a)(5) and 8(b)(3) that both employers and labor organizations bargain collectively, *id.* §§ 158(a)(5) & 158(b)(3). Then, in § 8(f), the Act creates a specific construction-industry exception. That exception says:

> (f) It shall not be an unfair labor practice under subsections (a) and (b) . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization [in the construction industry] . . . because (1) the majority status of such labor organiza-

> tion has not been established . . . , or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment . . . , or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for [seniority] requirements . . . .

Id. § 158(f). Without this exception a construction-industry prehire agreement might constitute an unfair labor practice, for such an agreement (naming the unions to which all employees of all contractors and subcontractors must belong) might be seen as interfering with employees' rights to bargain through representatives of their own choosing, in violation of §§ 8(a)(1) and 7, *see id.* §§ 158(a)(1) & 157, or unreasonably discriminating against those who are not union members, in violation of § 8(a)(3). *See id.* § 158(a)(3).

Section 8(e) supplements the list of unfair labor practices contained in §§ 8(a) and (b) of the Act. It says that it is an unfair labor practice for a labor organization and an employer to enter into what is known, colloquially, as a hot-cargo agreement, whereby a secondary employer agrees to help a union (engaged in a dispute with a different, primary, employer) by refusing to do business with that other, primary, employer. *See id.* § 158(e). However, a special construction-industry exception, attached to section (e), says:

> [N]othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contract-

> ing or subcontracting of work to be done at the site of the construction . . . .

Id. Without this second exception, a construction-industry prehire agreement might violate the hot-cargo prohibition, for it requires a signing contractor to "cease doing business" with a subcontractor unless the subcontractor enters into a similar hiring agreement with the union.

The background of these subsections makes clear why Congress chose to create an exception for the construction industry, and those reasons have nothing at all to do with the private or public nature of the general contractor. Labor and management in the construction industry engaged in prehire bargaining long before Congress passed the NLRA. *See To Amend the National Labor Relations Act, 1947, with Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 42 (1951) [hereinafter *Hearings*] (testimony of William E. Maloney, Vice Pres., Building and Construction Trades Dep't, Pres., Operating Engineers, A.F. of L.). The language of the 1935 Wagner Act seemed to outlaw prehire agreements, because, for example, the unions with whom employers would negotiate these agreements typically did not meet the Act's representational requirements. Nonetheless, the prehire bargaining practice continued. The NLRB initially refused to extend its jurisdiction to the construction industry. It said that activity in the construction industry did not "affect commerce." *See* S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952) (citing *In re Brown & Root, Inc.*, 51 N.L.R.B. 820 (1943)).

By the late 1940s, however, federal courts had held that the Board must exercise jurisdiction over this industry. *See* S. Rep. No. 1509, *supra*, at 4. And, the Board eventually concluded that the Taft-Hartley Act of 1947 required it to do so. Consequently, the Board began to invalidate union-security clauses in prehire agreements,

and it began to require union-certification elections. This effort to force elections proved unsuccessful. *Id.* at 5. The Board then announced that it would no longer insist on certification elections, but it would continue to invalidate clauses in prehire agreements when it confronted them. *Id.* at 5-6.

Soon thereafter, the Senate Subcommittee on Labor and Labor-Management Relations held hearings on the construction industry. *See Hearings, supra.* Representatives of both labor and management testified that the special characteristics of the construction industry made it impracticable, unnecessary and undesirable to comply with the requirements of the Wagner Act (as amended by the Taft-Hartley Act). They pointed out that a construction worker typically works at a particular work site only for a short time. In such a context, to require formal certification elections is impracticable, for particular employees would not stay on the job long enough to elect representatives who then would bargain with the employer. Those testifying feared that the alternative to prehire bargaining would be no bargaining at all. Without prehire bargaining, unions would not be able to bargain for union security, while contractors would not be able to estimate their labor expenses in advance and would not be able to rely on a steady supply of labor from union hiring halls. *See generally* S. Rep. No. 1509, *supra*, at 3-6 (summarizing testimony at hearing).

The Senate Committee on Labor and Public Welfare then favorably reported a bill that would permit prehire agreements. It said:

> The committee finds that the normal election procedures of the Board have proven unadaptable to this industry because of the short-term, casual employment that is typical to it. The General Counsel's efforts to devise special means . . . have proven fruitless. We conclude that the obstacles to conducting

> satisfactory elections in sufficient numbers are formidable, if not insuperable.

S. Rep. No. 1509, *supra*, at 6. The bill did not become law for some time. But, in 1959, Congress enacted a similar bill. Both the House and Senate Reports accompanying the 1959 bill indicate that the reasons for the exception of § 8(f) were those identified in the 1951 hearings, namely, the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry. *See* S. Rep. No. 187, 86th Cong., 1st Sess., 27-29 (1959), *reprinted in* 1 NLRB *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 423-25 (1985) [hereinafter *Legislative History*] (set out in Appendix); H.R. Rep. No. 741, 86th Cong., 1st Sess., 19-20 (1959), *reprinted in* 1 *Legislative History*, *supra*, at 777-78; *see also* 105 Cong. Rec. S5731 (daily ed. April 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1064 (remarks of Sen. Javits); 105 Cong. Rec. S5767 (daily ed. April 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, 1082 (remarks of Sen. Goldwater); 105 Cong. Rec. H14,204 (daily ed. Aug. 11, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1577 (prepared statement of Rep. Rayburn); 105 Cong. Rec. H16,630 (daily ed. September 4, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1715 (remarks of Sen. Kennedy); 105 Cong. Rec. A4308 (daily ed. May 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1750 (remarks of Rep. Kearns). At the same time, Congress enacted an exception to § 8(e), so that its prohibition of hot-cargo clauses would not prevent parties in the construction industry from entering into prehire agreements, which, traditionally, included a provision requiring the general contractor to award bids only to subcontractors who would sign the prehire agreement. *See* 105 Cong. Rec. S16,414 (daily ed. September 3, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1432 (remarks of Sen.

Kennedy) (stating that the proviso of § 8(e) was "necessary to avoid serious damage to the pattern of collective bargaining in [the construction] industr[y]"); 105 Cong. Rec. S16,414 (daily ed. September 3, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1721 (remarks of Rep. Thompson) (same).

As the majority correctly points out, the construction-industry exceptions use the word "employer," and § 2(2) of the Act specifically excludes "any State" from its definition of the word "employer." *Ante*, at 23-25, 32. That fact, however, does not destroy the relevance of the exceptions as an indication of Congress's pre-emptive intent. For one thing, the provisions show that Congress specifically focused upon the conduct in question, prehire bargaining, that Congress found that conduct prevalent in the construction industry, and that it wrote the exceptions with the expectation that the conduct would continue in that industry.

For another thing, the *reasons* Congress gave for authorizing the conduct have nothing to do with the public or the private nature of the employer. The special circumstances in the construction industry making meaningful posthire collective bargaining difficult; the corresponding custom in the industry; a general contractor's need to predict labor costs; his need to have available a steady supply of labor: these reasons have to do with the nature of the construction industry and collective bargaining in that industry, conditions likely to remain the same whether a public or private contractor lets contracts for the work.

Further, to permit private general contractors, but not states, to enter into construction-industry prehire agreements would likely produce an odd crazy-quilt of prehire practices. Whether one finds such an agreement would often reflect, not size of the project, or desire of the parties, or special conditions of the industry, but

simply whether or not the entity letting the contracts is an arm of the state or private. And, even among state projects, the presence or absence of such an agreement would depend upon whether state law permits the state in question to hire a private general contractor (who, then, presumably, would be free to enter into a prehire agreement), or, as in Massachusetts, requires the state agency to sign the relevant contracts itself. *See* Mass. Gen. L. ch. 30, § 39M; *id.* ch. 149, § 44A *et seq.* We do not understand what purpose, related to labor law, these legal distinctions could serve.

Finally, Congress had two perfectly good reasons for not making the construction-industry exceptions explicitly applicable to states, and neither of these reasons suggests any pre-emptive intent. First, the obvious reason is that the list of forbidden practices, to which the exceptions apply, itself applies only to an "employer," defined to exclude "any State," thereby leaving the regulation of labor relations between a state and its own employees primarily to state law. A drafter, writing a statutory exception to the resulting prohibition, would not normally extend its scope beyond those subject to the prohibition in the first place. Second, Congress, particularly when it enacted the construction-industry exceptions in 1959, had little reason to believe that a court might find, hidden in the silence of the Act, some other relevant prohibition applicable to a state.

In sum, the construction-industry exceptions in the Act, including their history and rationale, indicate that when a state acts as an ordinary private purchaser of construction services, it can enter into a typical prehire agreement without "frustrat[ing]" the "federal [statutory] scheme." *Malone*, 435 U.S. at 504.

2. *Supreme Court Precedent.* Unlike the majority, we believe that the relevant Supreme Court decisions offer fairly strong support for our conclusions. For one thing,

the *Machinists* case itself makes clear that the Act does not forbid all state action that might favor labor, but, rather, only those state actions that interfere with Congress's "*intentional* balance." *See Golden State*, 475 U.S. at 614 (citing *Machinists*, 427 U.S. at 146) (emphasis added). Here, for reasons just mentioned, we believe Congress intended a "balance" in the construction industry that includes prehire agreements.

For another thing, the Supreme Court has looked to legislative history (indeed, the language and history of *other* congressional statutes), as we have done here, to find the existence or absence of a congressional pre-emptive intent. After examining legislative history that would seem no more significant than that present here, for example, the Court upheld a state law providing unemployment benefits to striking workers, a law that would seem to tip the playing field in the strikers' favor. *See New York Tel.*, 440 U.S. 519.

Further, the Court has indicated that the kind of state activity involved is relevant to the pre-emption question. After all, the NLRA seems basically intended to supplant state labor regulation, not to supplant all legitimate state activity that might affect labor. Thus, it is not surprising that the relevant Supreme Court cases, speaking of the area where Congress implicitly intended labor-management relations "to be controlled by the free play of economic forces," refer to freedom from state *regulation*. In *Machinists* itself, for example, the Supreme Court refers to the relevant congressional pre-emptive intent as an intent to "leave some activities *unregulated*." 427 U.S. at 144. It said that the "activities" in question —workers deciding in concert to refuse overtime work— were not to be *regulable* by States . . . ." *Id.* at 149 (emphasis added). And, in *Golden State*, the Court, finding that California could not condition the renewal of a taxicab franchise upon settlement of a labor dispute, said that "*Machinists* pre-emption . . . precludes state

and municipal *regulation* 'concerning conduct that Congress intended to be unregulated.'" 475 U.S. at 614 (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985)) (emphasis added). At the same time, the Court has noted that even though *Machinists* pre-emption "does not involve in the first instance a balancing of state and federal interests," an "application of the State's interest in regulating a certain kind of conduct may still be relevant in determining whether Congress in fact intended the conduct to be unregulated." *Metropolitan Life*, 471 U.S. at 749-50 n.27.

Finally, when the Court has considered state *purchasing*, it has carefully considered the nature of the state's action and the legitimacy of the restriction's purpose. In *Wisconsin Department of Industry, Labor and Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986), the Court found pre-emption of a Wisconsin purchasing-related rule —a rule that disqualified as a supplier any firm found to have committed several unfair labor practices. In doing so, the Court stressed the lack of any such legitimate relation in the case before it. The Court said that "debarment . . . serves plainly as a means of enforcing the NLRA," *id.* at 287, that it "functions *unambiguously* as a supplemental sanction for violations of the NLRA, *id.* at 288 (emphasis added), and "[*n*]*o other purpose* could credibly be ascribed." *Id.* at 287 (emphasis added). The Court concluded that, because "*Wisconsin simply is not functioning as a private purchaser of services*, for all practical purposes, Wisconsin's debarment statute is tantamount to regulation." *Id.* at 289 (emphasis added). To emphasize the point—that Wisconsin was not acting like "a private purchaser of services"—the Court added:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies,

> like some exercises of the police power, address conduct that is of such 'peripheral concern' to the NLRA, or that implicates 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-244; see also, *e.g.*, *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U.S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. *We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.* The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA.

Id. at 291 (emphasis added).

In the case before us, the record makes clear that the MWRA is participating in a market place as a general contractor, like a private buyer of services. Its role as buyer is not, in any sense, a sham designed to conceal an effort to regulate. That role is direct, normal, and necessary for *purchasing*, not *regulatory*, reasons. The MWRA wants to condition its contracts in the same way as, and for the same reason as, private contractors normally insist upon similar conditions, namely to obtain peaceful working conditions, necessary to get the job done on time. The record requires us to take as given that, without a prehire agreement, hundreds of collective-bargaining agreements would expire during the life of the project, making labor strife likely. Because the major work site, Deer Island, is connected by a narrow isthmus to the mainland, a small number of pickets would find it easy to stop the entire project. Court-ordered deadlines

mean that delay would cause unusually serious problems. The record therefore supports the MWRA's contention that the prehire agreement serves its economic self-interest as a purchaser, that it is a "legitimate response to state procurement constraints or to local economic needs." *Id.*

The majority says that the language from *Gould* set out above contains only "dicta," and points out that the pre-emption at issue in *Gould* was *Garmon* pre-emption (pre-emption of state action regulating conduct that is arguably protected or forbidden by the NLRA), not *Machinists* pre-emption (pre-emption of state action regulating conduct that Congress intended to be controlled by the free play of economic forces only). Nonetheless, the "dicta" seem carefully considered, in a unanimous opinion. The fact that *Garmon* rather than *Machinists* pre-emption was at issue seems beside the point. Why would Congress want to leave the states *greater* freedom to interfere with control by the NLRB than to interfere with control by economic forces? Most important, the "dicta" suggest that the state's reasons for a labor-affecting condition are highly relevant, at least when the state is acting as an ordinary buyer. And, as we have just pointed out, the MWRA's reasons are legitimate.

In sum, the MWRA is acting like a buyer, and its reasons for the labor-related condition are legitimate. Furthermore, Congress specifically focused on the conduct in question and, in the case of private contractors, sanctioned it. In this context, we cannot say that the MWRA's actions "conflict" with the NLRA or would "frustrate" its purposes. We conclude that Congress did not pre-empt this state activity. Accordingly, we dissent. (We see no reason, since we are in dissent, to express our views on the other issues in the case, though we add that our views are similar to those of the district court.)

APPENDIX:

S. Rep. No. 187, 86th Cong., 1st Sess., 27-29 (1959).

The problems of the building and construction industry under the Taft-Hartley Act have been the subject of considerable comment by authorities in the field; and Congress in previous years has made several attempts to correct the shortcomings of the act as applied to the industry. The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

During the Wagner Act period, the National Labor Relations Board declined to exercise jurisdiction over the industry not only because of these complexities but also because the industry was substantially organized and hence had no need of the protection by the act. Concepts evoked by the Board therefore developed without reference to the construction industry. In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the act to the building and construction industry.

That this application of the act to the construction industry has given rise to serious problems is attested by the following in which the difficulties of the industry are set forth in detail:

[citing congressional hearings and presidential messages].

The bill endeavors to resolve certain most urgent problems, leaving to the future other difficulties which require attention.

Characteristics of the industry and the bill

In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or more or in many instances as much as 3 years. Since the vast majority of building projects are of short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements is not entirely consistent with the Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees hired.

. . . .

The bill, as did [an earlier version], contains other provisions which take into account the occasional nature of employment in the building and construction employee. It does so by reducing from 30 days to 7 the grace period before which the employee may be required to join the union. The reduction in this time allowance reflects the normally short employment period for construction employees. Also similar to [the earlier version] are provisions permitting an

exclusive referral system or hiring hall based upon objective criteria for referral. Such criteria as are spelled out in the bill are not intended to be a definitive list but to suggest objective criteria which shall be applied without discrimination. Thus it is permissible to give preference based upon seniority, residence, or training of the sort provided by the apprenticeship programs sponsored by the Department of Labor. These provisions are not intended to diminish the right of labor organizations and employers to establish an exclusive referral system of the type permitted under existing law.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., PLAINTIFFS, APPELLANTS

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY, ET AL., DEFENDANTS, APPELLEES

Appeal from the United States District Court
for the District of Massachusetts

[Hon. A. David Mazzone, *U.S. District Judge*]

Before

Campbell and Torruella, *Circuit Judges*,
and Re,* *Judge*

Maurice Baskin, with whom *Carol Chandler*, *Mary L. Marshall*, *Stoneman, Chandler & Miller*, *Thomas J. Madden*, *Venable, Baetjer, Howard & Civiletti*, were on brief for appellants.

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* The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

John M. Stevens for appellee The Massachusetts Water Resources Authority.

James J. Kelley for appellee Kaiser.

Donald J. Siegel, with whom *Mary T. Sullivan* and *Segal, Roitman & Coleman*, were on brief for appellee Building and Construction Trades Council of the Metropolitan District.

OCTOBER 24, 1990

TORRUELLA, Circuit Judge. Plaintiffs-Appellants Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC")[1] appeal the decision of the United States District Court for the District of Massachusetts denying ABC's request for a preliminary injunction. For the reasons stated below, we reverse this decision and remand for action consistent with our opinion.

I. PROCEDURAL BACKGROUND

ABC is an organization composed of individual construction contractors and trade associations representing over 18,000 "merit shop" (i.e., non-union) construction industry employers. On March 5, 1990, ABC brought suit in the United States District Court for the District of Massachusetts against the Massachusetts Water Resources Authority ("MWRA"), Kaiser Engineers, Inc. ("Kaiser") and the Building and Construction Trades Council and affiliated labor organizations[2] ("Trades Council"), challenging the legality of the bidding procedures established by MWRA to carry out $6.1 billion worth of public works known as the Boston Harbor Clean-Up Project ("Project"). ABC sought injunctive

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[1] Also its national association and five individual contractors.

[2] Thirty-four in all.

relief against enforcement of Specification 13.1 of the MWRA's bidding procedures, which provides that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ["the Master Labor Agreement"] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the [Trades Council] . . . and will be bound by the provisions of that agreement in the same manner as any other provisions of the contract. A copy of the agreement is attached and included as part of these Contract Documents . . .

ABC claims that, as applied to its membership, Specification 13.1 effectively bars them from seeking and obtaining any bids in this multi-billion dollar, ten-year endeavor. ABC alleges irreparable injury and damages from what it perceives to be a violation of various federal and state statutes, including the Sherman Act, 15 U.S.C. § 1, and the Massachusetts public bidding statutes, Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M, and moves for a declaratory judgment to the effect that the challenged specification is invalid by reason of its preemption by the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151, *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144.

The district court denied injunctive relief for reasons that will be discussed in more detail, *post*, and this appeal followed pursuant to 28 U.S.C. § 1292(a). Because of the importance of the issues raised, we granted expedited consideration.

II. THE FACTS

MWRA is a governmental agency authorized by the Massachusetts legislature to provide water supply services, sewage collection, and treatment and disposal serv-

ices for the eastern half of Massachusetts. Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, *United States of America* v. *Metropolitan District Commission*, C.A. No. 85-0489-MA (Mazzone, J.), the MWRA was ordered to meet a detailed timetable to carry out the clean-up of that body of water. The means and methods of carrying out this task are set forth in the MWRA's enabling statute, Mass. Gen. Laws ch. 92, app. §§ 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control and supervision over all aspects of this project.

In the spring of 1988, the MWRA retained Kaiser as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor, or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work and other limited or emergency situations.

Another important function of Kaiser is to advise the MWRA on the development of a labor relations policy which will maintain worksite harmony, labor-management peace, and overall stability during the ten-year life of the Project. The MWRA had already experienced work stoppages and informational picketing at various sites [3] and

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[3] In November of 1988, two member unions of the Trades Council picketed the Project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site. This is a well recognized method of maintaining continuity of work in the construction industry. Other threats were made to disrupt the work, but no other significant disruption actually occurred.

was concerned that, because of the scale of the Project and the number of different craft skills involved, it was vulnerable to numerous delays thus placing the court-ordered schedule in jeopardy and subjecting the MWRA to possible contempt orders. This concern was enhanced by the geographic location of the existing and proposed treatment facilities which makes them vulnerable to picketing and other concerted activity.[4]

The above circumstances led Kaiser to recommend to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Trades Council, in an effort to arrive at an agreement which would assure labor stability over the life of the Project. Any agreement would be subject to review and final approval by the MWRA.

The MWRA accepted Kaiser's recommendations and in early May 1989 Kaiser proceeded to meet with negotiating teams from the unions, including the Trades Council. The Master Labor Agreement was the result of their negotiations. After review by the MWRA staff, and upon its recommendation, the MWRA Board of Directors on May 28, 1989 adopted the Master Labor Agreement as the labor policy for the Project and directed that Specification 13.1 be added to the bid specification for all new construction work.

The Master Labor Agreement establishes as "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted by Contractors who

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[4] At Deer Island access to the site was by a single two-lane road passing through crowded Winthrop streets, and next to the existing Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Trades Council such as those representing maritime workers.

agree to execute and be bound by the terms of this Agreement." It is the duty of Kaiser on behalf of MWRA to "monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto." The parties state the need to meet the "specified and limited time frames" established by the district court's order in the Boston Harbor Clean-up case. Also agreed to are binding methods for the settlement of "all misunderstandings, disputes or grievances which may arise [and] . . . the Union, agree[s] not to engage in any strike, slowdown or interruption of work [or] the [employers] . . . to engage in any lockout."

Most importantly, the Trades Council is recognized "as the sole and exclusive bargaining representative of all craft employees," and its hiring halls are made the initial and principal source for the Project's labor force. All employees are subject to the union security provisions of the agreement which require that they become union members within seven days of their employment. Employees may seek redress for their grievances only through the recognized labor organizations, and the contractors are bound by the Trades Council member unions' wage and benefit provisions and apprenticeship program. The contractors are required to make contributions to various union benefit trust funds and to observe the unions' work rules and job classifications.

The Master Labor Agreement became "effective [on] May 22, 1989, and shall continue in effect for the duration of the Project construction work." As previously indicated, the Project is expected to take ten years to complete.

III. THE PROCEEDNGS BEFORE THE DISTRICT COURT

ABC's contentions before the district court can be summarized as follows:

(1) *Preemption under the NLRA.* ABC alleged that the NLRA prohibits the MWRA from interfering with the labor negotiations process, specifically arguing that requiring employers to accept the terms of a collective bargaining agreement with a union that has not been designated as the bargaining agent by employees is illegal. The district court held that Section 8(e) and (f) of the NLRA[5] permit such restrictive agreements in the construction industry and that even if the Master Labor Agreement were to affect NLRA-regulated conduct, such impact must be considered against the manifest importance of the Boston Harbor clean-up. "The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages." The court ruled that the Master Labor Agreement was lawful under the circumstances.

(2) *Preemption under ERISA.* ABC claimed that since the Agreement required employers to contribute to trust funds, the Agreement in effect regulated the terms and conditions of employee benefit plans covered under Section 514(c) of ERISA, 29 U.S.C. § 1144(c). The court disagreed, holding that the Agreement is not so broad and only applies to a single discrete project and thus does not contravene ERISA.

(3) *Equal protection and due process clause allegations.* ABC claimed that the bidding procedures discriminate against non-union contractors and effectively preclude such contractors from bidding, thus violating the equal protection and due process clauses. These claims were also rejected by the district court, which ruled that non-union contractors are not a protected class, that bidding procedures were open to all contractors, and that since ABC had failed to make any bid as of yet, a constitutionally protected right was lacking.[6]

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[5] 29 U.S.C. §§ 158(a) and (f).

[6] Analogous state claims were also rejected.

(4) *The Sherman Act claim.* ABC alleged that the Master Labor Agreement and Specification 13.1 constitute a conspiracy among appellees to reduce competition in the construction industry by effectively precluding non-union contractors. Below, the court reiterated that appellants were not excluded from the bidding process and furthermore since the Master Labor Agreement "serves legitimate business, and public purposes" there was no anti-trust violation. Moreover, the district court found that the MWRA, as a state entity, is immune from an anti-trust claim and that Section 8(e) of the NLRA along with labor's non-statutory anti-trust exemption under the Sherman Act protect Kaiser and the Trades Council as well.

(5) *State law claims.* The district court rejected ABC's state law violations claim, ruling that the Massachusetts Public Bidding statute specifically required that the winning bidder must furnish labor that can work in "harmony with all the other elements of labor employed or to be employed on the work." It further ruled that there was no interference with business relationships because no relationships existed as of yet.

Thus, the district court denied a preliminary injunction holding that first, the appellants were not likely to succeed on the merits. Second, ABC had not shown immediate and irreparable harm because it had not been awarded a contract and even if it had it would have an adequate remedy at law. Third, the balance of harm to the appellants was outweighed by the harm to the appellees, since the appellees would suffer ominous delays, disruptions, and increased costs in the Boston Harbor clean-up without Specification 13.1. And last, issue of an injunction would adversely affect the public interest in the swift clean-up of Boston Harbor.

IV. STANDARD OF REVIEW

On review, we will reverse the district court's denial of a preliminary injunction where the denial is an abuse of discretion, or is based upon a clear error of law, or where the district court's findings of fact are clearly erroneous. *See, e.g., Massachusetts Ass'n of Older Americans* v. *Sharp*, 700 F.2d 749, 751-52 (1st Cir. 1983); *Maceira* v. *Pagán*, 649 F.2d 8, 15 (1st Cir. 1981); *General Electric Co.* v. *New York State Dept. of Labor*, 891 F.2d 25, 26 (2d Cir. 1989) (reversing denial of preliminary injunction on ERISA preemption grounds); 7 Moore, *Federal Practice and Procedure* ¶ 65.04[2] (2d ed. 1987). Where, as here, appellants are asking for a mandatory injunction which will change the *status quo ante* during the pendency of litigation, we will take into account the exigencies and circumstances of the situation. *See Massachusetts Coalition of Citizens with Disabilities* v. *Civil Defense Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

To be entitled to injunctive relief a party must establish that it has a likelihood of success on the merits, that it will suffer immediate and irreparable harm if relief is not granted, that such harm outweighs any harm to the non-moving party, and that the public interest will not be adversely affected. *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *Lancer* v. *Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir. 1985). The balancing of interests shifts in plaintiffs' favor when a strong likelihood of success on the merits is shown. *SEC* v. *World Radio Mission, Inc.*, 544 F.2d 535, 541-42 (1st Cir. 1976).

V. DISCUSSION

In our opinion, appellants present a portentous argument that there is a strong likelihood of their success on the merits, an argument which ultimately carries the day.

A. *Preemption under the NLRA*

We commence with the text book proposition that under the supremacy clause of Article VI of the Constitution,[7] the "supreme" congressional law supersedes or preempts state law. Preemption occurs not only when there is an outright conflict between the federal scheme and the state requirement, but also when congressional action is an implicit barrier—*e.g.*, when state regulation interferes unduly with the accomplishment of congressional objectives. Congressional legislation in an area in which a state seeks to regulate does not necessarily preclude all state action. Nor does the fact that there is no explicit federal-state conflict or congressional statement of intent to bar state authority inescapably rule out a finding of preemption. *Cf. Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957).

> The question in each case is what the purpose of Congress was [in legislating] . . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often

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[7] U.S. Const. art. VI, para. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

> a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (citations omitted).

Turning to the specific legislation at hand, the NLRA, as amended,[8] we find that since first enacted in 1935 it "has empowered the National Labor Relations Board 'to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce.'" 29 U.S.C. § 160(a). "By this language, and by the definition of 'affecting commerce' . . . Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss* v. *Utah Labor Board*, 353 U.S. at 3. *See* 29 U.S.C. § 152(7).[9] Thus, in the area of labor relations there is "not only a general intent to pre-empt the field but also . . . [the] inescapable implication of exclusiveness." *Guss* v. *Utah Labor Board*, 353 U.S. at 10. In *Guss* the Supreme Court went so far as to carry that principle to the point of creating a no-man's land, in which no jurisdiction existed on behalf of state authorities to intervene in labor relations matters covered by the Act notwithstanding the Board's refusal to exercise dominion over such disputes. It should be noted that, although *Guss* involved unfair labor practices, the Act uses substantially similar language regarding the representation procedures established thereunder, and

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[8] 29 U.S.C. § 151, *et seq.*

[9] 29 U.S.C. § 152(7):

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

See NLRB v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 325-26 (1940) (construing "affecting commerce").

therefore the principle established by *Guss* is of equal application to representation matters.[10]

The situation created by *Guss* led in 1959 to the amendment by Congress of Section 14 of the Act, allowing for state intervention in labor disputes affecting commerce in which the Board has specifically declined to exercise jurisdiction.[11] Prior to that amendment, as is discussed in *Guss*, *id.* at 6-7, a state could only intervene in a labor dispute affecting commerce if the Board had entered into a cession agreement pursuant to Section 10 (a) of the Act,[12] and then only if the state statute was consistent with a corresponding provision in the Act.

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[10] *See* 29 U.S.C. §§ 141(b), 151, 152, 157, 159. For example, § 159(c)(1) provides that:

> Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation *affecting commerce* exists shall provide for an appropriate hearing upon due notice . . . (emphasis supplied).

[11] 29 U.S.C. § 164:

> (c)(1) The Board, in its discretion may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[12] 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power

Intervention in labor matters affecting commerce today is thus limited to cession agreements by the Board with the states under Section 10(a) of the Act, or specific declinations by the Board to intervene pursuant to Section 14(c) of the Act. There is a third category, also under Section 14 of the Act,[13] which allows the states to legislate to prohibit union shop agreements.

The Supreme Court has recognized two types of federal preemption of state and local government action in the field of labor law. First, the Supreme Court has prohibited the states from regulating activities "which are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). Second, the Court has held that state and local governments are prohibited from regulating activities which Congress intended to be left unrestricted by any governmental power. *Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers* v. *Wisconsin Emp. Comm.*, 427 U.S. 132, 140 (1976).

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shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

[13] 29 U.S.C. § 164(b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

While both forms of preemption are implicated by this appeal, the present case is indisputably controlled by the Supreme Court's holding in *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), which relied on and expanded upon the *Machinists* doctrine.[14] The similarities between *Golden State* and the present case are considerable.

In *Golden State* the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the franchise on settlement of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. The Supreme Court ruled that the city's action in conditioning renewal of the franchise on settlement of the labor dispute was preempted by the Act. The Court stated, in language particularly apropos to the present controversy:

> Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, . . . unless such restrictions presumably were contemplated by Congress. . . . "[T]he crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' "

Id. at 614-15 (citations omitted). The city's insistence on a settlement was preempted by the Act because it " 'entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced.' "

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[14] In *Machinists*, the Court had found unlawful a state commission's prohibition against union refusals to work overtime during collective bargaining negotiations, 427 U.S. at 148-49.

Id. at 615-16 (citations omitted). This was so because "[t]he NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616.

In the present case, the state's intrusion into the bargaining process is all-pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here *eliminates* the bargaining process altogether. Regulation of this conduct [15] is clearly central to federal labor relations and cannot be considered peripheral under the *Garmon* analysis. *San Diego Unions* v. *Garmon*, 359 U.S. at 243. *See Belknap, Inc.* v. *Hale*, 463 U.S. 491, 509 (1983) (third parties hired as strike replacements had state-law causes of action based on misrepresentations by the employer); *Automobile Workers* v. *Russell*, 356 U.S. 634, 635 (1958) (state court jurisdiction over common law tort action against union for mass picketing upheld); *Youngdahl* v. *Rainfair*, 355 U.S. 131, 132 (1957) (same re injunctive power to prevent interference with free use of streets) *Automobile Workers* v. *Wisconsin Emp. Rel. Board*, 351 U.S. 266, 274 (1956) (same re power to enjoin violent union conduct); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 657 (1954) (state may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways); *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Board*, 315 U.S. 740, 749 (1942) (same). Nor can it be considered that the "regulated conduct touche[s]

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[15] The fact that the state here has acted through its bidding regulations rather than its general law is irrelevant to our analysis, as "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State*, 475 U.S. at 614 n.5, (quoting *San Diego Unions* v. *Garmon*, 359 U.S. at 243).

interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the State of the power to act." *San Diego Unions* v. *Garmon*, 359 U.S. at 244. The regulated conduct here is the labor relations/bargaining process itself. Such processes have been ruled upon by Congress as paramount to national, not local interests. *See General Electric Co.* v. *Callahan*, 294 F.2d 60, 67 (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832 (1962) (holding that a state labor board's interference with a labor contract negotiation "conflict[ed] with the national policy of free and unfettered collective bargaining").

Appellees contend that, had the Master Agreement been entered into directly between the state agency and the unions, it would be unassailable, because "[t]he National Labor Relations Act leaves regulation of the labor relations of state and local government to the States."[16] *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 223 (1977); 29 U.S.C. § 152(2). The state's substantial participation in the Project, however, is not enough to alter its status from regulator to employer. There are insufficient indicia of an employer/employee relationship between the MWRA and the laborers.[17] Rather, the state is in its common role

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[16] There are, of course, federal statutes other than the NLRA which treat the actions of states and private parties differently. *See, e.g.*, the Sherman Antitrust Act, 15 U.S.C. §§ 1, 7 (prohibiting certain private conduct but exempting the states); the Securities Act, 15 U.S.C. § 77(c) (exempting government securities from the Act's provisions); the Civil Rights Act, 42 U.S.C. § 1983 (prohibiting certain state conduct only).

[17] The distinction between an employee and an independent contractor under the NLRA is to be determined by application of common law agency principles. *See NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *Air Transit, Inc.* v. *NLRB*, 679 F.2d 1095 (1982). Under this standard, the relationship between the construction workers and the MWRA is a contracting, not an employment, relationship. For example, the MWRA does not have

of a third party purchaser. Indeed, if the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would seem to swallow the rule.[18] Allowing a state to impose restrictions upon all companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees.

Moreover, the Supreme Court has rejected the proposition that the state employer exclusion from the NLRA is analogous to the somewhat similar Commerce Clause market participant exception. *Wisconsin Dept. of Industry* v. *Gould*, 475 U.S. 282, 289-90 (1986). In *Gould*, the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts. The state argued that it should not be restricted by the Commerce Clause when it acts as a market participant. The Court rejected this argument, noting first, that the state was functioning more as a regulator than as a market participant, and second, that the exception to the Commerce Clause might be broader than state action allowed under the NLRA. The Court based its analysis on the differing purposes served by the Commerce Clause and the NLRA: whereas the Commerce Clause contains " 'no indication

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the right to control the laborers' performance, nor does it pay their salaries, provide pension or other benefits, or make FICA payments on their behalf.

[18] Nevertheless, there may be situations in which a contractual relationship between the state and a private entity is such that the state would be considered an employer for the purposes of the NLRA. *See, e.g., Board of Trustees of Memorial Hosp.* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980) (holding that where a private employer who has contracted to provide services to an exempt political subdivision does not retain sufficient control over the employment relationship to engage in collective bargaining . . . the exempt subdivision is deemed the true employer); *Compton* v. *National Maritime U. of America*, 533 F.2d 1270 (1st Cir. 1976) (noting that a private contractor that performs services for an exempt governmental agency may be deemed to share the exemption).

of a constitutional plan to limit the ability of the States themselves to operate in the free markets,' . . . [t]he NLRA, in contrast, was designed in large part to 'entrust administration of the labor policy for the Nation to a centralized administrative agency.'" *Id.* (citations omitted).

Thus, although the MWRA's attempt to regulate may well pass scrutiny under the Commerce Clause, it cannot survive under the NLRA. There should at this late date be no question that either because of its regulation of matters protected by § 7 of the Act (*e.g.*, the mandatory recognition of the Trades Council), *San Diego Unions* v. *Garmon*, 359 U.S. at 245, or because of its direct intrusion into the collective bargaining process, *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. at 614-15, Specification 13.1 frustrates the purposes of the Act and therefore must fall under the doctrine of pre-emption.

B. *Section 8(e) and (f) of the Act—The Construction industry exemption*

Appellees argue, and the District Court in effect ruled, that the provision of Sections 8(e) and (f) of the Act validate the Master Labor Agreement "in the context of the unique conditions which exist in the construction industry."

Section 8(e) of the Act[19] makes it an unfair labor practice for an employer and a union to enter into what

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[19] 29 U.S.C. § 158(a) states in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organi-

is commonly referred to as a "hot cargo" agreement. Under a "hot cargo" agreement, generally, the employer binds itself not to do business with another employer or person. These type of agreements developed out of situations in which unions did not want their members to be working or handling "struck" goods. Section 8(e), however, contains a limited exemption for the construction industry, "relating to the contracting or subcontracting of work to be done at the site of the construction." Thus "hot cargo" agreements are legal to this circumscribed extent, in the construction industry.

Section 8(f) of the Act [20] creates another exception for the building and construction industry by allowing cer-

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zation and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

[20] 29 U.S.C. § 158(f):

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or

tain actions, which would otherwise be prohibited as unfair labor practices, by employers and unions in that line of work. Thus a construction industry employer may enter into a so-called "pre-hire" agreement with a union, *e.g.*, a collective bargaining agreement wherein the union's representative status is immaterial and in fact is usually entered into prior to the hiring of any employees. Furthermore, such an agreement may contain a union shop provision requiring membership in the union seven days after hiring, 29 U.S.C. § 158(f)(2), which would otherwise be illegal;[21] a requirement that the employer notify the union of job openings giving the labor organization an opportunity to refer qualified job workers, 29 U.S.C. § 158(f)(3); as well as a condition establishing minimum training or experience qualification and area-wide seniority. 29 U.S.C. § 158(f)(4).

A construction industry labor contract entered into under the exceptional provisions of Section 8(f) is not, as specifically stated in the final proviso of that section, a bar to a petition for election, be it by a rival union,[22] by the employer[23] or by the employees themselves.[24] If the employees elect a rival union as their bargaining agent, neither the winning union nor the employer are required to assume the 8(f) contract. If the employees reject the 8(f) contracting union as their bargaining agent and do not choose another bargaining agent, the contract is

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in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[21] The usual provision is 30 days. *See* 29 U.S.C. § 158(a)(3).

[22] 29 U.S.C. § 159(c)(1)(A).

[23] 29 U.S.C. § 159(c)(1)(B).

[24] 29 U.C.C. § 159(e)(1).

totally void because one of the contracting parties is disqualified.

It is apparent from the above that under the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser, is a valid labor contract. *See Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-66 (1983). That conclusion, however, is irrelevant. Appellants do not challenge the validity of that agreement, they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing of the Master Labor Agreement as a condition of the award of an MWRA bid. On said issue, Sections 8(e) and (f) have no bearing, except as reinforcement for appellants' preemption arguments. It is clear, both from their nature and history, that Congress extensively debated and considered these controversial provisions before their enactment. *See generally*, 1959 U.S. Code Cong. & Admin. News, p. 2318. It is unlikely that Congress intended to leave open to Balkanization by the states, such core areas as unfair labor practices and collective bargaining, which are the matters inescapably arising from Sections 8(e) and (f) problems. There can be no question but that in enacting these exceptional provisions Congress occupied the field to the exclusion of Specification 13.1. *Guss* v. *Utah Labor Board*, 353 U.S. at 10. In short, although the Master Labor Agreement is a valid contract pursuant to Sections 8(e) and (f) of the Act, Specification 13.1 must be struck down as unduly interfering with the area of labor negotiations Congress intended to leave unregulated under the same statute.

C. *State interests*

The district judge, in a commendable attempt to harmonize the irreconcilable conflicts presented by this difficult case, reasoned that even if the Master Labor Agreement "were to have some impact on NLRA-regulated con-

duct, that impact must be considered in the light of important state interest, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense." In effect, the court held that this public purpose sanitized its constitutional shortfalls. While we do not totally fault the court's efforts in this respect, nor disagree as to the importance of the Boston Harbor clean-up, it cannot be said that congressional concern for a uniform, national labor policy as embodied in the NLRA, is entitled to secondary deference.

There are few areas in which local interest can be more legitimately exercised than in protecting the public from financial hardship caused by fiscally irresponsible persons using the state highways. Yet the Supreme Court invalidated a state statute whose purpose was resolution of such a dilemma because it concluded that it conflicted with the Federal Bankruptcy Act. *Pérez* v. *Campbell*, 402 U.S. 637, 656 (1971). The Court rejected the argument that the purpose of the state law, rather than its effect on the operation of federal legislation, should govern its validity. Even if the state claimed to be concerned with promotion of highway safety, such a statute could not stand if it conflicted with the federal scheme: "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective —that would be tangentially furthered by the proposed state law." *Id.* at 652.

Although the local concerns that led to the promulgation of Specification 13.1—"labor harmony during [the] life . . . [of] . . . this critical project"—are laudable, they conflict with paramount federal law and must therefore fall. We should add that we are in any event somewhat skeptical of the *pax industrial* which the Master Labor Agreement utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that

this contract is no bar to rival, or for that matter, anti-union, activity. *See* 29 U.S.C. § 158(f), *last proviso.*

D. *Other Allegations*

In view of our ruling on the issue of preemption of Specification 13.1 by the Act, it is unnecessary for us to reach the other questions raised by the appeal. *See Lane* v. *First National Bank of Boston*, 871 F.2d 166, 168 (1st Cir. 1989).

VI. CONCLUSION

Specification 13.1 unduly restricts aspects of the labor-management relationship intentionally left unregulated by Congress and is thus preempted by the National Labor Relations Act, as amended. 29 U.S.C. § 151, *et seq.* The decision of the district court is reversed and mandate shall ensue forthwith with instructions to the district court that it issue an order preliminarily enjoining enforcement of Specification 13.1.

Reversed and remanded.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 90-10576-MA

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., PLAINTIFFS

vs.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY, ET AL., DEFENDANTS

MEMORANDUM AND ORDER

Mazzone, D.J. April 11, 1990

This is an action for damages, injunctive and declaratory relief, at the heart of which is the Boston Harbor clean-up project. The plaintiffs, Associates Builders and Contractors of Massachusetts/Rhode Island, Inc. (ABC), its national organization and five individual contractors, seek to enjoin the defendants, The Massachusetts Water Resources Authority (MWRA), its project manager, Kaiser Engineers, Inc. (Kaiser), and the Building and Construction Trades Council (Council), from enforcing Specification 13.1 of the MWRA's bid procedures. Specification 13.1 requires that all successful bidders on construction contracts affecting the harbor clean-up agree to observe the Boston Harbor Wastewater Treatment Facilities Agreement (Agreement). The Agreement, in turn, requires that the Council's member unions, thirty-four in all, serve as the exclusive bargaining representative for

all employees on project contracts; that all employees must be referred by local union hiring halls; that all employees are subject to the union's compulsory membership provisions; that all employees are governed by the unions' wage and benefit provisions, contributions, and union work rules and job classifications.

The plaintiffs' position is straightforward. They claim that without injunctive relief, the plaintiffs are effectively prevented from obtaining work on this multi-billion dollar, ten-year, public works project. Affidavits submitted by ABC, its national organization and the plaintiff contractors allege that all construction contracts should be awarded to the lowest, responsible bidder through open and competitive bidding regardless of labor affiliation. If this practice were followed, they say, the taxpayers and consumers would receive the most value for their construction dollar. These non-union contractors, though ready, willing and able to perform on project contracts have not, and will not bid on any contracts because of the restrictive requirements of the Agreement. They seek damages for violations of the anti-trust provisions of the Sherman Act, 15 U.S.C. § 1, and certain state common law torts. They also seek a declaratory judgment: that the Agreement is pre-empted by the National Labor Relations Act (NLRA) and the Employee Retirement Income Security Act (ERISA); that the Agreement denies the plaintiffs' due process and equal protection rights under the state and federal constitutions; and, finally, that the Agreement violates the Massachusetts public bidding statutes.

On that record, the plaintiffs claim they have satisfied the criteria necessary for injunctive relief, namely: they have demonstrated a likelihood of success; will suffer immediate and irreparable harm if relief is not granted; such harm outweighs any harm to the defendants, and, the public interest will not be adversely affected. *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir.

1981). Pursuant to Rule 52, Fed. R. Civ. P., and after review of the entire record, including all affidavits, and after hearing, I make the following findings of fact and conclusions of law.

I.

The MWRA is responsible for the Boston Harbor clean-up project pursuant to orders and a schedule established by this Court. *See* Memorandum and Orders issued on September 5, 1985, December 23, 1985 and May 8, 1986, in *United States of America* v. *Metropolitan District Commission, et al.*, Civil Action No. 85-489-MA. In April, 1988, the MWRA retained Kaiser as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work, and other limited or emergency situations. Another important function of Kaiser was to advise the MWRA on the development of a labor relations policy which would maintain worksite harmony, labor-management peace and overall stability during the ten year course of the project. The MWRA had already experienced work stoppages and informational picketing at various sites and was concerned that because of the scale of the project and the number of different craft skills involved, the project was vulnerable to numerous delays, thus placing the court-ordered schedule in jeopardy and subjecting it to the contempt orders of this Court. This concern was enhanced by the geographic location of the existing and proposed treatment facilities, especially at Deer Island where access to the site was by a single two lane road, through crowded Winthrop streets, and past the existing Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Proposed

facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Council, such as the maritime workers' union.

Kaiser, by virtue of its extensive experience on large construction projects and its dealings with hundreds of building trade unions, recognized and understood the need for labor peace and stability on a project of this magnitude. It was aware that the MWRA was operating under court-mandated milestones and it knew of the significant union presence in the Boston area. A major concern was the location of the work sites and the pressure points at which labor demonstrations could choke the movement of personnel and material. Accordingly, Kaiser recommended to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Council, in an effort to arrive at an agreement which would assure labor stability over the life of the project. Any agreement was subject to review and final approval of the MWRA.

The MWRA accepted Kaiser's recommendations and in early May, 1989, negotiating teams from the unions and Kaiser met. The Agreement was the result of their negotiations. Its principal provisions were standardization of working conditions for all construction employees, particularly hours and travel pay, a ten-year no-strike clause and an effective and expeditious dispute resolution mechanism. After review of the MWRA staff and upon its recommendation, the MWRA Board of Directors, an May 28, 1989, adopted the Agreement as the labor policy for the project and directed that Specification 13.1 be added to the bid specification for all new construction work. The purpose was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the risk of substantial fines for non-compliance. In the

absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. And, of course, delays will mean that Boston Harbor would continue to be subjected to environmental abuse.

Against this factual backdrop, I turn to the criteria for injunctive relief. I focus primarily on the likelihood that the plaintiffs will succeed on the merits and their claims and deal *seriatim* with the specific grounds asserted.

1. *Preemption Under the NLRA*

The plaintiffs say that because the MWRA, a public agency, has dictated the terms of the Agreement under which the ABC contractors can work, but has not allowed those contractors to participate in the negotiations that produced the Agreement, it has impermissibly intruded into the area of labor law preempted by the NLRA. Citing *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) and *Hydrostorage, Inc.* v. *Northern California Boilermakers Local Joint Apprenticeship Committee*, [685] F. Supp. 718 (N.D. Cal. 1988), *aff'd*, 891 F.2d 719 (9th Cir. 1989); the plaintiffs' claim that the NLRA guarantees them the right to bargain independently with only those unions designated by their own employees. Therefore, the question presented is whether by virtue of the Agreement, there has been some interference by either the MWRA or Kaiser in an area which Congress sought to leave unregulated.

As clear as the plaintiffs posit their claim, it is equally clear that Congress addressed that claim in the context of the unique conditions which exist in the construction industry. Sections 8(e) and 8(f), NLRA; *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). Section 8(e) contains a proviso expressly permitting restrictive agreements which bind other secondary employers, such as the plaintiffs, when,

as is the fact here, Kaiser plans to employ some employees at the site. *Morrison-Knudsen Co., Inc. NLRB Advice Memorandum*, March 27, 1986. Section 8(f) allows construction labor agreements that condition employment upon a willingness to abide by union rules, even though the employees did not designate the unions as their representative. *NLRB* v. *Ironworkers*, 434 U.S. 335. These special privileges for the construction industry were necessary, Congress found, to alleviate the serious problems arising out of the unique practices of the construction industry. *NLRB* v. *Ironworkers, supra. Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982).

Even if this Agreement were to have some impact on NLRA-regulated conduct, that impact must be considered in the light of important state interests, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense. The scope of preemption requires an examination of "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 297 (1977); *Beckwith* v. *United Parcel Service, Inc.*, No. 89-1476, slip op. (1st Cir. November 16, 1989). This critical project compels labor harmony during its life. Given the many, different crafts involved, and the number of separate contracts necessary and the probability of local, isolated, jurisdictional disputes among *represented* employees could bring the project to a halt at any time and on a perfectly lawful basis. The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages.

Under the circumstances present in this case, I believe the Agreement is lawful.

2. *Preemption Under ERISA*

Pursuant to Section 514(a), 29 U.S.C. § 1144(a), ERISA preempts all state laws which relate to an em-

ployee benefit plan. The plaintiffs claim that this Agreement requires employers to contribute to trust funds and, thus, it purports to regulate the terms and conditions of employee benefit plans as defined by Section 514(c). *Hydrostorage, Inc., supra.*

Unlike the situation presented in *Hydrostorage, supra,* this Agreement applies to a single, discrete project. It does not apply to all state contracts or to all employers doing business in the state. The state's concern here is to maintain labor harmony on a single, albeit large, public works project that presents the variety of problems set out above. The Agreement does not purport to regulate the terms and conditions of employee benefit plans. Section 514(c), ERISA. No specific plan or benefit is mandated. The agreement simply requires successful bidders to abide by negotiated conditions which can be altered or modified during the life of the contract. Whatever effect the Agreement may have on employee benefit plans is too remote or peripheral to constitute state law. *Wisconsin Department of Industry, Labor and Human Relations* v. *Gould, Inc.*, 475 U.S. 282, 281 (1986). *Shaw* v. *Delta Airlines*, 463 U.S. 85, 100 n.21 (1983).

3. *The Fourteenth Amendment Claims.*

(a) *Equal Protection.*

The plaintiffs claim, that in reacting to a threat of labor unrest, the MWRA is effectively sponsoring discrimination against non-union contractors, and discriminating in favor of organized labor. *City of Richmond* v. *J.A. Croson*, 109 S. Ct. 706 (1989).

This argument fails for two reasons. First, non-union contractors do not constitute a protected class for purposes of equal protection analysis. *Hoke Co.* v. *TVA*, 854 F.2d 820, 828 (6th Cir. 1988). All contractors are invited to bid on the same terms. No contractor is favored under the bid procedures even though a non-union

contractor may be required to conform to certain terms and conditions under which a union contractor already operates. Secondly, if there were disparate treatment, the state's interest in eliminating disruption and delay on the project provides a rational basis for the Agreement. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

(b) *Due Process*

The plaintiffs claim that by incorporating the Agreement into its bid procedures, the MWRA is effectively precluding the plaintiff contractors from bidding, and thus, is depriving non-union contractors of a protected property interest in an award or consideration for a contract.

First, the plaintiff contractors have not bid on any contract and, therefore, cannot claim that they were denied access to the bidding process or denied the fair application of the bidding procedures. *Smith & Wesson* v. *United States*, 782 F.2d 1074 (1st Cir. 1986); *Three Rivers Cablevision, Inc.* v. *City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980). Moreover, they are unable to specify any entitlement to a contract, other than to voice a desire to bid unencumbered by the terms of the Agreement. This is not sufficient to establish a constitutionally protected right under the Fourteenth Amendment. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Accordingly, the plaintiffs have not been denied a fair consideration for the award of any contract.

4. *Violation of the Sherman Act, 15 U.S.C. § 1*

The plaintiffs claim that the Agreement and its incorporation by Specification 13.1 demonstrates a conspiracy among the defendants, fueled by the coercive tactics of the Council, to reduce competition in the construction industry by effectively precluding non-union contractors from bidding on harbor clean-up contracts.

Again, it must be pointed out that the plaintiff contractors have not been excluded from bidding. They

simply have refused to bid on any contract because of what they term is their principled unwillingness to submit to the conditions laid down by the MWRA. Even if the MWRA's position could be termed a refusal to deal, such a refusal would not be unreasonable. The MWRA's purpose has always been to maintain the court-ordered schedule at the greatest cost savings by reducing the potential of work stoppages due to labor unrest. This Agreement serves a legitimate business, and public purpose and, thus, does not violate the anti-trust laws. E.g., *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981); *cert. denied*, 454 U.S. 921 (1982). Moreover, the state action doctrine bars this claim. *Parker* v. *Brown*, 317 U.S. 341 (1943). As a state entity the MWRA is immune from an anti-trust claim. *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F.2d 9, 13 (1st Cir. 1987). This doctrine also bars the anti-trust claims against Kaiser. *See Southern Motors Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 56-59 (1985).

Finally, the claim against Kaiser and the Council is based on their execution of the Agreement. That claim is barred by Section 8(e) of the NLRA and labor's non-statutory anti-trust exemption under the Sherman Act. As the facts show, Kaiser's employees will be covered by the Agreement and, thus, Kaiser will be treated in the same manner as all other contractors. *Woelke & Romero Framing, Inc.* v. *NLRB*, *supra.*

5. *The Massachusetts Public Bidding Statutes*

The plaintiffs next claim is that the Agreement violates the public bidding statutes of Massachusetts, because it effectively precludes non-union bidders. G.L. c. 30, § 39M and G.L. c. 39, § 44A.

The short answer to this claim is in the language of the statutes. Passing the question of standing to raise this issue, the statutes require the MWRA to award work

to the "lowest responsible and eligible" bidder who "shall certify that (it) is able to furnish labor that can work in harmony with all the other elements of labor employed or to be employed on the work." G.L. c. 30 § 39M(c), G.L. c. 149 44A(1). The MWRA has the authority to make that determination and its determination will be upheld unless it is arbitrary, capricious or made in bad faith. *Modern Continental Construction Company, Inc.* v. *Massachusetts Port Authority*, 369 Mass. 825 (1975). *See also* Opinion of February 16, 1990, Executive Office of Labor, Department of Labor and Industries, Exhibit D to Complaint.

6. *The Massachusetts Constitutional and State Law Claims.*

These claims fail for a variety of reasons, some of which are discussed above and the remaining issues require no more than a brief note. There can be no interference with advantageous business relationships because the MWRA has not refused, nor will it refuse to enter into any contract that conforms to the terms of the Agreement, nor is there anything in the record to show that Kaiser or the Council is procuring or attempting to procure such refusals. The state constitutional and civil rights claims like their federal counterparts above, fail to identify the particular right or interest which has been violated or denied. See generally *Associates Builders and Contractors of Kentuckyiana, Inc.* and *River City Development Corporation* v. *Ohbayash Corporation*, No. 87-38 (D. Ken. October 26, 1987).

III.

Based on the foregoing findings and conclusions, the plaintiffs are not entitled to preliminary injunctive relief.

1. As the above discussion indicates, the plaintiffs have failed to demonstrate a likelihood of success on the merits.

2. The plaintiffs will suffer no immediate and irreparable injury. After waiting over nine months to bring this motion, the plaintiffs have not bid on any contract for which they claim they are eligible. Had they bid and been awarded a contract, they would have suffered no harm.[1] Had they bid and been denied a contract, they would be in a position to claim damages if the Agreement were later shown to be illegal.

3. The harm to the plaintiffs is outweighed by the harm to the defendants. First, the plaintiffs are not precluded from bidding. And since the plaintiffs agree they must pay at least the prevailing wage on this project, their harm appears limited to a violation of their announced principle that they should not be required to recognize unions and union regulations that have not been designated by their employees. Other than this project, the non-union contractors are free to operate on their own terms on any other job and they are free to litigate the validity of the Agreement and, if successful, establish their damages.

On other hand, the defendants will suffer serious harm in the absence of this Agreement. Disruption, delays and increased costs to the ratepayers and taxpayers are virtually certain to occur without the means to eliminate

---

[1] At hearing, counsel for ABC advised the Court that one contract awarded by the MWRA to DEC-TAM Corporation, a non-union contractor, had been cancelled because of the Agreement. An affidavit supporting that statement was later filed by the executive vice-president of ABC.

That affidavit was followed in short order by an affidavit from the MWRA indicating that the contract, for asbestos removal from three engines, was not for services subject to the Agreement and was awarded to the only bidder in response to limited advertising. After work was completed on one engine which was urgently needed, the contract was cancelled because the other two engines were in sufficiently good condition for emergency, stand-by duty and the price was too high. If further work were needed, the MWRA will advertise more extensively to obtain the lowest price.

the basic conflicts and without the mechanism to resolve anticipated disputes.

4. The public interest will be adversely affected were the injunction to issue. As the foregoing makes evident, the Agreement insures that the long overdue harbor clean-up will not be delayed by labor disharmony. The right of the public to an unpolluted harbor, maintaining the schedule for the clean-up and controlling its cost are vital concerns.

The plaintiffs are careful to point out that they do not seek to delay the Boston Harbor clean-up project, but only to provide high quality construction work at lower costs, with greater flexibility and freedom than would be possible if they were to operate under restrictive union agreements. They are also careful to say they do not oppose the entire Agreement, and would be bound by the no-strike clause, most of the dispute resolution provisions and standardized work hours. They simply oppose those provisions which compel recognition of unions or which compel them to adopt specific union contracts.

This position seems to ignore Congress' purpose in enacting Sections 8(e) and 8(f), NLRA, to address the reality of the unique conditions in the construction industry. That reality is present in the circumstances of this case, and under those circumstances, I conclude the Agreement is not unfair or illegal.

Accordingly, the motion for preliminary injunction is denied.

SO ORDERED.

/s/ A. David Mazzone
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC.,
PLAINTIFF, APPELLANT

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY,
ET AL., DEFENDANTS, APPELLEES

Before

Breyer, *Chief Judge*,
Campbell, Torruella, Selya and Cyr, *Circuit Judges*

ORDER OF COURT

Entered: January 3, 1991

The Building and Construction Trades Council of The Metropolitan District petitions this Court to rehear en banc the above-captioned case. We hereby grant the petition. This Court's mandate is recalled, the panel-opinion is withdrawn and the judgment is vacated. Argument will be heard on February 4, 1991. The briefing schedule shall be as follows: The appellant will file its brief on or before January 17, 1991 and the appellees will file their briefs on or before January 24, 1991. The en banc

panel will refer to the briefs filed before the original panel.

While the parties are free to raise and to discuss the arguments they consider relevant and important, the court wishes to be certain that the parties discuss the following:

> Is MWRA's insistence upon the labor conditions at issue reasonably related to an important proprietary interest of the state, a legitimate response to state procurement constraints, or a legitimate response to local economic needs?
>
> If so, is that insistence therefore lawful, *Wisconsin Department of Industry* v. *Gould, Inc.*, 475 U.S. 282, 291 (1986) and *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), being distinguishable in this respect?

By the Court:

/s/ Francis P. Scigliano
Clerk

[Cert. cc: Clerk, U.S.D.C. of Massachusetts, cc: Messrs: Baskin, Kelley]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Civil Division

Civil Action #90-105-76-MA

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., PLAINTIFFS

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY, ET AL., DEFENDANTS

ORDER

[Filed Nov. 10, 1990]

Upon consideration of Plaintiffs' Motion for a Preliminary Injunction and the mandate of the Court of Appeals entered on October 25, 1990, it is, this 9th day of November, 1990,

ORDERED that Piaintiffs' request for a Preliminary Injunction is hereby granted and Defendants are hereby enjoined from enforcing MWRA Bid Specification 13.1 in connection with the Boston Harbor Wastewater Treatment Project.

/s/ A. David Mazzone
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS
OF MASSACHUSETTS/RHODE ISLAND, INC.,
PLAINTIFF, APPELLANT

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY,
ET AL., DEFENDANTS, APPELLEES

ORDER OF COURT

Entered: January 10, 1991

The court of appeals has decided to grant the appellants' motion to maintain in effect the district court's injunction against the use of Bid Specification 13.1 pending the outcome of this appeal. This determination reflects the full court's decision not to alter the existing situation as of the time the full court vacated the panel's decision, and it is not meant to imply any view about the merits of the appeal. Because, after the filing of appellants' motion (on January 7, 1991), the district court (on January 9, 1991) dissolved its injunction, the court of appeals orders the following:

> The court of appeals, while retaining jurisdiction over this case, remands the case to the district court for the sole purpose of re-entering the injunction that was in effect from November 9, 1990, through January 9, 1991, pending further order of this court.

By the Court:

/s/ Francis P. Scigliano
Clerk

APPENDIX G

UNITED STATES GOVERNMENT
National Labor Relations Board

[NLRB Logo]

Date: June 25, 1990
8(e) Chron
8(f) Chron
584-5000

Memorandum

To: Rosemary Pye, Regional Director
Region 1

From: Harold J. Datz, Associate General Counsel
Division of Advice

Subject: Building & Trades Council, et al
(Kaiser Engineers, Inc.)
Case 1-CE-71

This case was submitted for advice as to: (a) whether a provision in a contract is a "hot cargo" agreement; and (b) if so, whether it is privileged by the construction industry proviso of Section 8(e).

Facts

The Massachusetts Water Resources Authority (MWRA) is responsible for the Boston Harbor clean-up project under a federal court order pursuant to the Clean Water Act.[1] In April 1988, the MWRA chose Kaiser Engineers, Inc. (Employer), a well known general contractor and construction manager, to be the program/construction manager for the project.

As construction manager, the Employer is required to manage and supervise the project, including planning,

[1] The court order also imposes a time table for the project which involves construction of wastewater treatment facilities for the Boston Harbor.

procurement, budget, scheduling and labor relations matters. Because of concerns about possible conflicts of interest arising from the program/construction manager's role, the MWRA has barred the Employer from bidding on any of the construction work for the project. However, with MWRA approval, the Employer intends to employ construction trades employees on the project in certain limited circumstances.[2]

In May 1989, the Employer entered into a project agreement (Agreement) with the Building and Trades Council and approximately 40 local and international construction trade unions (Unions) for the construction work on the Harbor project.[3] The Agreement provides standardized working conditions for all construction employees.[4] It also provides that all construction subcontractors must agree to be bound by the Agreement.

In March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island (ABC) brought a civil action, including a request for a preliminary injunction, attacking the legality of the Agreement on various grounds.[5] On April 11, 1990, the district court denied the request for preliminary injunctive relief. The court found, inter alia, that the Agreement was lawful under the proviso to Section 8(e) and under Section 8(f).

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[2] M.G.L. Chapter 30, Section 39M requires that any work performed for the Commonwealth of Massachusetts must be put out to bid if the cost of that work exceeds $5,000. The MWRA and the Employer agree that the Employer can perform certain construction work in cases of default or incomplete performance by other contractors, clean-up and temporary work, and in other limited emergency situations which would cost $5,000 or less.

[3] There is no contention that the Employer acted as an agent of MWRA rather than as a principal when it signed the Agreement.

[4] Article II of the agreement provides that any construction work the Employer performs will also be covered by the Agreement.

[5] Among other grounds, ABC argued that the Agreement, whose terms were approved by the MWRA, was preempted by the NLRA.

On March 14, 1990, the Utility Contractors Association of New England (UCA) filed the instant charge alleging that the Agreement was in violation of Section 8(e). UCA contends that the provision is not privileged by the construction industry proviso to Section 8(e) since the Employer does not and will not employ any employees on the project.[6] UCA further contends that even if the Employer employs any craft employees the Agreement is still not valid as it was entered into by the MWRA as a result of unlawful secondary pressure. In this regard, UCA relies on picketing by several Unions at other MWRA jobsites prior to the negotiation of the Agreement. Lastly, the UCA contends that even if the Agreement is lawful in general, it is unlawful with respect to surveyors since it does not cover surveyors employed by the Employer.

Action

We conclude that the provision is a "hot cargo" agreement within the ambit of Section 8(e). We further conclude that the provision was lawful under the construction industry proviso to Section 8(e).

Initially, we concluded that the clause is a "union signatory" clause and is secondary and within the ambit of 8(e). The agreement between the Employer and the Unions requires that all subcontractors on the site must be bound by the Agreement.[7] In essence, the Employer cannot do business with companies who do not agree to bound to the Union contract. Thus, the Agreement would

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[6] UCA disagrees with MWRA and the Employer that the Employer can perform certain construction work on the project. It argues that the Employer is prohibited by state law from doing any construction work on the project without first bidding for it. Since the MWRA has barred the Employer from bidding on any construction work, the UCA argues that the Employer will not be able to perform any construction work on the project.

[7] *Orange Belt District Council of Painters No. 48 (Maloney Specialties, Inc.)*, 276 NLRB 1372, 1387 (1985).

violate Section 8(e) unless it is encompassed by the construction industry proviso to Section 8(e).

The Supreme Court has held that the construction industry proviso to Section 8(e) authorizes a "union signatory" clause by a union and an employer in the construction industry in the context of a collective bargaining relationship.[8] In the instant case, it first must be determined whether the Employer is an employer in the construction industry. The Employer is a well-known general contractor and construction manager. Indeed, in the instant case, the Employer's main responsibility is to supervise the project, including planning, procurement, budget, scheduling, and labor relations. In addition, the Employer will employ employees on the project. Where, as here, an employer's principal business is in the construction industry, and it is acting as an employer of construction employees on the particular project, it is clear that such an employer is "an employer in the construction industry" for purposes of Section 8(e).[9] Moreover, even if an employer's principal business is not in the construction industry, but it acts as the general contractor on a specific construction project, the Board finds it to be an employer in the construction industry based on the degree of control it retains over the labor relations at the jobsite.[10] As noted, supra, the Employer's prime responsibility in this case is to supervise labor relations on the jobsite.

Next, it must be determined whether the Agreement was entered into in the context of a collective bargaining relationship. A Section 8(f) relationship satisfies this

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[8] See *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 633 (1975).

[9] *United Brotherhood of Carpenters and Joiners of America (Longs Drug Store, Inc.)*, 278 NLRB 440, 442 (1986).

[10] *Los Angeles Building & Construction Trades Council (Church's Fried Chicken, Inc.)*, 183 NLRB 1032 (1970).

requirement.[11] In the instant case, the Employer entered into a Section 8(f) pre-hire contract with the Unions.

The Charging Party contends that there can be no bargaining relationship of any kind unless the Employer hires and intends to hire employees covered by the Agreement. The General Counsel has authorized 8(e) proceedings where the employer did not hire and did not intend to hire any construction employees.[12] However, in the instant case, the Employer intends to employ craft employees on the project, and these employees will be covered by the Agreement.[13] Thus, it is clear that the Employer entered into a valid Section 8(f) relationship. Accordingly, the Agreement is protected by the proviso.

This conclusion is consistent with the district court's opinion.

Furthermore, we conclude that there is insufficient evidence to find that the Agreement was entered into as a result of unlawful secondary pressure. The picketing has not been established as unlawful. In addition, the picketing involved the MWRA, not the Employer. Moreover, none of the described activity was engaged in for the purpose of forcing the Employer or any other employer to enter into a "hot cargo" contract.

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[11] *Los Angeles Building & Construction Trades Council (Donald Shriver, Inc.)*, 239 NLRB 264, 267-70 (1978), enfd. 635 F.2d 859, 872-876 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981); *A.L. Adams Construction Co. v. Georgia Power Co.*, 557 F.Supp. 168, 174-77 (1983), affd. 733 F.2d 853, 856-58 (11th Cir. 1984), cert. denied 471 U.S. 1075 (1985).

[12] *Plumbers Union Local 246 (Marlin Mechanical, Inc.)*, Case 32-CE-52 (1989).

[13] UCA contends that, under state law, Kaiser cannot lawfully employ employees to perform work on this site. However, the state agency, MWRA, has decided that the Employer can do so, and the Employer intends to do so. In these circumstances, we do not consider it within our province to rule on the state law question.

With respect to the surveyors, UCA asserts that the Employer's surveyors will not be covered by the Agreement. However, the fact is that they will be covered. The UCA's mistaken belief apparently stems from the fact that the Employer's professional engineers, who use surveyor equipment, are not covered by the Agreement. It does not appear that the "union-signatory" requirement extends to subcontractors who employ professional engineers.

Based on the above, we conclude that the instant charge should be dismissed, absent withdrawal.

/s/ HJD
H.J.D.

ROF-3
y:kaiser.lfa

APPENDIX H

THE COMMONWEALTH OF MASSACHUSETTS
Executive Office of Labor
Department of Labor and Industries
Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston, 02202

[SEAL]

Office of the Commissioner
James F. Snow
(617) 727-3454

February 16, 1990

F. Lester Fraser, President
Fraser Engineering Co.
63 Court Street
Post Office Box 61
Newton, Massachusetts 02160

RE: Boston Harbor Project
Massachusetts Water Resources Authority

Dear Mr. Fraser:

I am writing in response to your letter dated September 21, 1989, protesting the decision of the MWRA to award bids only to contractors who agree to comply with the Project Labor Agreement for the Boston Harbor Project. It is the opinion of this Department that the MWRA acted properly, and that such a requirement is legal. Because of the importance of this issue, it is essential to answer your concerns in a thorough manner.

The Massachusetts Water Resources Authority (MWRA), under a mandate to clean up Boston harbor, established the Boston Harbor Project (Project). The MWRA hired Kaiser Engineers, Inc. (Kaiser) to be the

Program/Construction Manager on the Project. Kaiser negotiated a Project Labor Agreement (Agreement) with the Building and Construction Trades Council of the Metropolitan District, its affiliated local unions, and the Building and Construction Trades Department, AFL-CIO, which states that all contractors awarded a job under the Project will follow the Project Labor Agreement on the Project.

Article I sets forth the purpose of the Agreement, as follows:

> The Boston Harbor Project, an undertaking of the Massachusetts Water Resources Authority, is the largest public works project in the history of New England. The goal of the Project is to provide effective sewage disposal for the people of Massachusetts. Pursuant to an order issued by the United States District Court for the District of Massachusetts, the Authority has authorized the construction of new wastewater treatment facilities and related facilities to reduce pollution in the Boston Harbor. The Court has ordered that these facilities be completed within specified and limited time frames.
>
> The timely and successful completion of the Project is of vital importance to all the people of the Commonwealth of Massachusetts. Therefore, it is essential that the construction work be done in an efficient and economical manner in order to secure optimum productivity and to eliminate any delays in the work. In recognition of the special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the term of this Project Labor Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise. Therefore, the Unions agree not engage in any strike, slowdown or interruption of work and the Contractor agrees not to engage in any lockout.

The conditions for bidding and award of contract, as established in Article II, Section 2(a), provide that:

> The Authority, Project Contractor and/or Contractor, as appropriate, has the absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or non-existence of any Agreements between such bidder and any party to this Agreement provided, however, only that such bidder is willing, ready and able to execute and comply with the Project Labor Agreement, should it be designated the successful bidder.

The Project is operating under the jurisdiction of U.S. District Court Judge A. David Mazzone, who held that wastewater discharges into Boston Harbor were in violation of the Federal Clean Water Act of 1972. He issued an order outlining a mandatory timetable for the completion of construction of primary and secondary wastewater treatment facilities. Every month the MWRA submits a report to Judge Mazzone demonstrating its compliance with his scheduling orders. Taxpayers of cities and towns serviced by the MWRA bear the majority of the costs of the construction. Kaiser estimated that these costs would increase by an estimated two million dollars per week with any delay in the construction schedule.

The geographical setting of the Project is particularly conducive to labor-related disputes which could cause delay. Access to the two construction sites, Deer Island and Nut Island, is by boat or by bus. With access to the work sites so limited, there is great potential for labor unrest to interfere with the construction. In fact, before the Agreement was adopted, the potential was already realized. On November 9, 1988, Pipefitters Local 537 and Sheet Metal Workers Local 17 set up pickets at the entrance to the work site on Deer Island. Since the work site was accessible by only one road, the picketing resulted

in a work stoppage. The construction schedule was not resumed until November 14 when the picketing ended.

In order to avoid this sort of disruption, among others, the Agreement provides several dispute resolution mechanisms. First, there is an expedited arbitration process for any violation of the no-strike clause in the Agreement. Additionally, there are provisions for the resolution of individual employee grievances. Finally, the Agreement establishes a procedure for settling jurisdictional disputes, whether inter-disciplinary or inter-trade. This procedure is essential for strife-free construction in the Boston area where the unions do not participate in the National Joint Board for the Settlement of Jurisdictional Disputes.

As the construction of wastewater treatment facilities, the Project falls under the public construction bid statutes. The two Massachusetts statutes which govern the award of public construction contracts are Massachusetts General Laws c. 30 § 39M and c. 149 §§ 44A-J. Both statutes require that the awarding authority award the bid to the lowest responsible and eligible bidder. § 44A defines these, as follows:

> "Responsible" means demonstrably possessing the skill, ability and integrity necesssary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter; "Eligible" means able to meet all requirements for bidders or offerors set forth in sections forty-four A through forty-four H of this chapter . . . and who shall certify that s/he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.

Likewise, c. 30 § 39M(c) provides that:

> (t)he term "lowest responsible and eligible bidder" shall mean the bidder (1) whose bid is lowest of those

> bidders possessing the skill, ability and integrity necessary for the faithful performance of the work; (2) who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work . . . .

In addition, M.G.L. c. 30 § 39M(a) states that an "awarding authority may reject any and all bids, if it is in the public interest to do so." Likewise, M.G.L. c. 149 § 44E(1) provides that "the awarding authority shall reserve the right to reject any or all such general bids, if it be in the public interest to do so."

At their foundation, the Massachusetts bid laws establish a level playing field for bidders. *Builders Realty Corp. of Massachusetts v. City of Newton*, 201 N.E.2d 825 (Mass. 1964). "(T)he purpose of the competitive bidding statutes is not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an open and honest procedure for competition in public contracts." *Modern Continental Construction Co., Inc. v. City of Lowell*, 465 N.E.2d 1173, 1179 (1984). The bidding process must be as equitable as possible. "So long as bidders have an opportunity to bid in the same way, on the same information, and to bear the same risk of rejection, fairness and equality are preserved." *Department of Labor and Industries v. Boston Water and Sewer Commission*, 469 N.E.2d 64, 68 (1964).

Furthermore, M.G.L. c.149 § 44D permits the awarding authority to set the terms of the job specifications. Provided that its requirements are not illegal, unreasonable or in violation of the statutory scheme, the awarding authority may require that which goes beyond the statutory minimum. See, *e.g.*, *Gil-Bern v. City of Brockton*, 353 Mass. 503 (1968); *Builders Realty Corp. of Massachusetts v. City of Newton*, 348 Mass. 65 (1964). The Department recently upheld this proposition in a case decided September 11, 1989, *In Re: Wareham EDIC and*

the Protest of AGM Maritime Contractors, Inc., finding that a bidder must comply with certain minority participation requirements set forth in the specifications for the project. "(T)here is no question that the specifications issued by the Wareham EDIC made mandatory the submission of the schedule (for minority participation) for participation with the bid." *Id.* at 7.

There is no Massachusetts case directly on point on the issue of an awarding authority requiring the qualified bidder to agree to comply with a project labor agreement. However, the court in a related case construes the language in the statutes regarding labor harmony and the public interest. In *Modern Continental Construction Co., Inc. v. Massachusetts Port Authority*, 343 N.E.2d 362 (1976), the court held that the awarding authority may reject the lowest bidder if it determines that s/he cannot furnish labor able to work in harmony. The case involved a non-union construction firm, Modern Continental Construction Co., Inc. (Modern), which was the lowest bidder on a drainage project at Logan Airport. There were other construction projects ongoing at the Airport, including some projects nearby which employed members of Local 4 of the Operating Engineers. The business agent for that union advised the Authority that because Modern did not observe area standards for operating engineers, the local would publicize this fact by various means, including picketing. The Port Authority decided that because "there was a likelihood that the award of this contract to . . . Modern would result or give rise to a disruptive labor dispute," it would not award the bid to Modern and rejected all the bids. *Id.* at 363. In the next round of bids, Modern was not the lowest bidder and brought suit that it was entitled to the award or damages, in the alternative.

There are distinct similarities between the facts in *Modern Continental* and the Project. Each involves a geographical layout conducive to the quick spread of labor unrest. The court in *Modern Continental* found that

labor discord was a likely result of the proximity of workers from both the non-union drainage project and the nearby union construction projects, because there were only two gates through which all workers could enter the work sites. Similarly, one can imagine the entire Harbor Project disrupted by pickets placed at the entrance of the boats carrying the workers or the pick-up points for the buses. Another similarity concerns the evidence of the likelihood of labor disputes at the work site. In *Modern Continental* the court found that the letter from the business agent which stated the union's intention to publicly protest Modern's participation, combined with the Authority's subsequent deliberation on the matter, justified the Authority's rejection of the bids. How much more convincing than a potential threat was the actual work stoppage at the Deer Island site of the Boston Harbor Project, where the likelihood of a dispute was actualized, justifying the MWRA's establishment of a labor policy to avoid such disharmony.

While not dispositive, *Modern Continental* begins to illuminate the concept of labor harmony. First, the court held that the Authority, not the bidder, had the discretion to decide whether the bidder's labor could work in harmony. *Modern Continental* permits the awarding authority to decide if the bidder can furnish labor which will work in harmony, rather than having to rely on the bidder's own assertion. Second, the court said that the Authority did not act in an arbitrary or capricious manner, or in bad faith, where the Authority seriously and in a deliberate manner considered whether the business agent's letter was credible in presenting a probable labor dispute.

The MWRA has satisfied these threshold inquiries. Concerns about labor harmony had arisen from the start of the Project. The MWRA had already suffered one work stoppage, and was mandated to follow a federal court timeline which could be disrupted by further dis-

putes. Furthermore, without the help of the national jurisdictional board or an expedited arbitration process, the MWRA had no guarantee that for the next ten years there would be no other disputes, whether jurisdictional, interest or individual grievances. Faced with this possibility and determined to avoid labor unrest, the MWRA decided to fashion a labor policy which required a contractor to comply with terms preventing such unrest. This compliance would provide certification to the MWRA that the contractor could provide workers able to work in harmony with all other workers at the site.

As to the second issue, where the likelihood of labor discord was fulfilled, the MWRA cannot be said to have acted in an arbitrary or capricious manner, or in bad faith, in developing a labor policy to avoid such discord in the future. It is mandated to protect the interest of the public in having a major construction job performed in a timely and economical manner.

Since the labor harmony language does have substance, i.e., the awarding authority may consider whether in its opinion the workers of a contractor are able to work in harmony with others employed on the work site, it remains to consider the scope of its application.

Modern Continental does not define the scope of the labor harmony language, but does illuminate part of its application. That case "clearly contemplates a situation in which the union and non-union workers work in some type of proximity to one another." *Id.* at 364. However, the court did not address other situations contemplated by the language. The term "labor harmony" is a broad one, and not on its face applicable only to one kind of labor dispute. There are other types of labor unrest that could delay a project: an interest strike by a union during contract negotiation; a jurisdictional dispute between two unions over a work classification; or a strike over a grievance about working conditions.

The MWRA developed its policy in light of potential labor disputes not only between union and non-union, but also to avoid interest and jurisdictional strikes common in the industry. During the ten years of construction work on the Project collective bargaining agreements between unions and management will have to be negotiated several times. An interest strike at contract negotiation time is not unlikely; indeed, the potential for unrest is much more likely then. The MWRA could face several interest strikes over the course of the ten year Project. In addition, the potential for jurisdictional strikes is immense with the large number of unions participating in the Agreement. When all this is viewed through the prism of the particular geographical setting of the Project and the urgency of the federal court deadline, the requirement that a bidder comply with the Agreement seems prudent in protecting the public's interest in a timely-completed construction.

Without the Agreement, any of the various kinds of labor unrest would undercut a contractor's self-serving certification that s/he "is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work." M.G.L. c. 149 § 44A. The Agreement constitutes the authority's standard for a contractor's certification that labor disputes will not occur on the work site. The certification comes from the workers themselves who agree, through the Agreement, not to strike. No such guarantee of labor harmony, contractual or otherwise, exists when the entire work force is non-union. However, although a contractor using solely non-union labor cannot guarantee that his or her workers are able to work in harmony with all others on the site, no such contractor will ever say that his or her workers cannot work in harmony with others. To permit the contractor to assert this ability on the part of his or her workers without more of a guarantee would render the labor harmony language meaningless. The holding in *Modern Continental*, requiring the awarding

authority to decide who can work in harmony in awarding the bid, thus reflects the reality of the workplace.

The case before us is one where the public interest must be balanced with individual right. There are several safeguards of the right of a contractor with a solely non-union work force. For example, there is no requirement that any job other than the Project be done with union workers, and no requirement that the contractor sign off on a collective bargaining agreement with a union. On the other hand, the public has an interest in the construction of its public structures in an efficient, productive manner where costs to its citizens are controlled. Where the means to achieve that goal are reasonable, as they are here with the Project Labor Agreement, the results cannot be viewed as discriminatory. This is particularly true when combined with a recognition of the rights of the individual. The interest of the public in having the work done on time, without any labor disruption delaying the work and increasing the costs outweighs any individual's right to a contract on his/her own terms. . .

It is argued that *Modern Continental* is dispositive because of dicta prohibiting restrictions to union firms in bidding. But the extent of the dicta was that bidding can not be restricted to unionized firms only, because that denies an equal opportunity to contract. See *Master Printers Association v. Trustees of Jr. College District No. 508*, 356 F.Supp. 1355 (N.D.Ill.1973). Such is not the case here. The bidding was not restricted to contractors with a union work force. The MWRA required that the lowest responsible and eligible bidder, whether union or non-union, must agree to comply with the Agreement. Article III of the Agreement provides that the contractor must agree to use the local union's job referral system for labor on the Project, or to give preference to applicants referred by the local union where the union has no such referral system. Article III further states

that the job referral system must be operated in a non-discriminatory manner. This comports with case law construing a provision in the National Labor Relations Act, 29 U.S.C. § 158(f) (1974), which requires that a union hiring hall refer applicants to a contractor regardless of their membership in the union. See *e.g.*, *Laborers International Union of North America v. Kunco, Inc.*, 472 F.2d 456 (8th Cir. 1973); *Associated General Contractors of North Dakota v. Otter Tail Power Co. and Bechtel*, 457 F.Supp. 1207 (D.N.D. 1978), aff'd, 611 F.2d 684 (1979).

Although the Agreement provides that candidates for jobs will be referred by the union to the contractor, a union work force was not a prerequisite to bidding on the Project. Under such a scheme, all firms, union and non-union, would have had to sign labor agreements with unions which would have been binding on them for the life of the agreement, and for all jobs, public or private, undertaken by the contractor, whether or not they were awarded the bid for the Project. Besides being illegal, this would be highly impractical and inefficient. On the contrary, the MWRA required that the bidder who was awarded the job comply with the Project Labor Agreement, agreeing to use labor supplied through the local union's job referral system only for the life of the Boston Harbor Project.

Finally, the Agreement diminishes the possibility that the MWRA will face the problems and costs of re-bidding due to labor unrest, as in *Modern Continental*. Since any bidder who wishes to be awarded a job with the Project must comply with the Agreement, the MWRA is assured that whomever it chooses as the lowest eligibile and responsible bidder for each contract awarded under the Agreement will not contravene the labor harmony language of the statute. This permits the MWRA to proceed expeditiously with the Project without having to choose between labor discord or prolonged re-bidding, saving the general public money and time.

The public bid statutes give an awarding authority the discretion to reject any and/or all bids, if it is in the public interest to do so. Although there is no case law on the issue of rejecting the lowest bidder for not furnishing labor able to work in harmony and selecting the next lowest bidder who can, in *Modern Continental* the court held the awarding authority justified under the labor harmony clause in rejecting the low bidder and re-bidding the project.

The result in *Modern Continental, i.e.*, re-bidding the project upon the finding of a credible threat to labor harmony, potentially poses for awarding authorities without such a Project Labor Agreement the prospect of delays in the commencement of the project and increased costs associated with re-bidding and inflation. This is especially true for a job of the magnitude of the Project where there are one hundred (100) contracts under the Agreement. For the MWRA to have to re-bid each time labor harmony was threatened, as in *Modern Continental*, would ". . . thwart one of the fundamental purposes of public bidding: to enable an awarding authority to obtain the lowest price for its work which competition among responsible contractors can secure, and to assure qualified bidders of equal treatment if they submit bids." *Wareham EDIC, supra* at 8,9.

Without language similar to that in the Agreement, delays due to questions of labor harmony could repeat indefinitely, thus confronting the awarding authority with a Hobson's choice of additional costs associated with repeated re-bidding or additional costs associated with the delays occasioned by a prolonged strike. Such a result is both illogical and contrary to the public interest in the competent, expeditious construction of public works at the lowest price by a qualified contractor.

In summary, the awarding authority in the Boston Harbor Project did not violate the Commonwealth's competitive bidding statutes when it required the lowest re-

sponsible and eligible bidder to agree to follow the Project Labor Agreement. Accordingly, your protest is denied.

Very truly yours,

/s/ James F. Snow
JAMES F. SNOW
Commissioner

cc: Catherine Farrell, Esq.
Massachusetts Water Resources Authority

William J. Curtin, Esq.
Morgan, Lewis & Bockius

APPENDIX I

BOSTON HARBOR WASTEWATER TREATMENT FACILITIES PROJECT LABOR AGREEMENT

BY AND BETWEEN

KAISER ENGINEERS, INC., ON BEHALF OF THE MASSACHUSETTS WATER RESOURCES AUTHORITY,

AND THE

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT AND ITS AFFILIATED LOCAL UNIONS AND LOCAL 52, BRICKLAYERS, LOCAL 424, CARPENTERS, LOCAL 133, LABORERS,

AND THE

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO AND ITS AFFILIATED INTERNATIONAL UNIONS AND THEIR AFFILIATED LOCAL UNIONS

Effective May 22, 1989

NOTE: Schedule A's and Schedule B's are not attached to this Agreement, although they are incorporated herein by reference as if fully set forth. Copies of Schedule A's and Schedule B's may be examined at the address specified in the Advertisement for Bids where Documents may be obtained and are available upon request. Note that Schedule B's are applicable and available for Projects including tunnelwork only.

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BOSTON HARBOR WASTEWATER TREATMENT FACILITIES PROJECT LABOR AGREEMENT

AGREEMENT

This Project Labor Agreement (hereinafter, the "Agreement") is entered into this 22nd day of May 1989, by and between Kaiser Engineers, Inc. (hereinafter, the "Project Contractor"), its successors or assigns, and the Building and Construction Trades Department, AFL-CIO (hereinafter, the "Department"), on behalf of its affiliated International Unions and their Local Unions, and the Building and Construction Trades Council of the Metropolitan District on behalf of its affiliated Local Unions, and Local 52, Bricklayers; Local 424, Carpenters; and Local 133, Laborers, each acting in its own behalf and on behalf of its respective affiliates and members (hereinafter, collectively called the "Union" or "Unions"), with respect to the construction of the wastewater treatment facilities and related facilities in Suffolk and Norfolk Counties, Massachusetts, known as the "Boston Harbor Project".

It is understood by the parties to this Agreement that it is the policy of the Massachusetts Water Resources Authority (hereinafter, the "Authority") that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement. Therefore, the Unions agree that other Contractors may execute the Agreement for the purpose of covering that work. The Project Contractor shall monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto.

The term "Contractor" shall include all Contractors and subcontractors of whatever tier engaged in on-site construction work within the scope of this Agreement, including Kaiser Engineers, Inc. when it performs construction work within the scope of this Agreement. Where

specific reference to Kaiser Engineers, Inc. alone is intended, the term "Project Contractor" is used.

The Union and the Project Contractor and all signatory Contractors agree to abide by the terms and conditions contained in this Agreement with respect to the administration of the Agreement by the Project Contractor and the performance of the construction by the Contractor of the Project. This Agreement represents the complete understanding of the parties, and it is further understood that no Contractor party is required to sign any other agreement as a condition of performing work within the scope of this Agreement. No practice, understanding or agreement between a Contractor and a Union party which is not explicitly set forth in this Agreement shall be binding on any other party unless endorsed in writing by the Project Contractor.

ARTICLE I

PURPOSE

The Boston Harbor Project, an undertaking of the Massachusetts Water Resources Authority, is the largest public works project in the history of New England. The goal of the Project is to provide effective sewage disposal for the people of Massachusetts. Pursuant to an order issued by the United States District Court for the District of Massachusetts, the Authority has authorized the construction of new wastewater treatment facilities and related facilities to reduce pollution in the Boston Harbor. The Court has ordered that these facilities be completed within specified and limited time frames.

The timely and successful completion of the Project is of vital importance to all the people of the Commonwealth of Massachusetts. Therefore, it is essential that the construction work be done in an efficient and economical manner in order to secure optimum productivity and to eliminate any delays in the work. In recognition of the

special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the terms of this Project Labor Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise. Therefore, the Unions agree not to engage in any strike, slowdown or interruption of work and the Contractor agrees not to engage in any lockout.

ARTICLE II

SCOPE OF THE AGREEMENT

Section 1. This Agreement, hereinafter designated as the "Project Labor Agreement" or "Agreement," shall apply and is limited to all construction work (including pre-operational testing, check-out and startup) under the direction of the signatory Contractors and performed by those Contractor(s) of whatever tier which have contracts awarded for such work on and after the effective date of this Agreement, which may include the Project Contractor, for the Authority, with regard to the wastewater treatment facilities being developed in and around Boston Harbor by the Authority and herein called the "Project".

Such Project is generally described as the construction of:

(1) primary, secondary and residual wastewater treatment facilities on Deer Island (located in Boston Harbor);

(2) head works on Nut Island;

(3) a tunnel under Boston Harbor from Nut Island to Deer Island;

(4) an outflow eastward into the Atlantic Ocean from Deer Island, including the installation of diffusers;

(5) related facilities which include, as necessary,

(a) site preparation, demolition and/or rehabilitation of facilities now located on the site;

(b) designated materials and personnel loading and unloading and staging sites dedicated to the Project;

(c) transportation systems in and around the Harbor for personnel and materials; and

(d) installation of utilities necessary for the operation of the Authority's Deer Island facilities, not otherwise undertaken by public or private utility organizations, in the town of Winthrop;

(6) the interim and permanent sludge treatment plants at FRSA; and

(7) new construction/rehabilitation work for the Authority's current operating facilities on Deer Island and Nut Island awarded after the effective date of this Agreement.

Section 2(a). The Authority, Project Contractor, and/or Contractor, as appropriate, has the absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or non-existence of any Agreements between such bidder and any party to this Agreement provided, however, only that such bidder is willing, ready and able to execute and comply with the Project Labor Agreement, should it be designated the successful bidder.

(b). It is agreed that all direct subcontractors of a Contractor, of whatever tier, who have been awarded contracts for work covered by this Agreement on or after the effective date of this Agreement shall be required to accept and be bound by the terms and conditions of this Project Labor Agreement.

Section 3(a). The provisions of this Project Labor Agreement (including the attached Schedule A's which are the Local Collective Bargaining Agreements and the attached Schedule B's which are the local Collective Bargaining Agreements covering tunnels of Local 4, OE; Local 88, LIUNA; and Local 103, IBEW, which have jurisdiction over tunnel work) shall apply to the construction of the Project, notwithstanding the provisions of Local, Area, and/or National Agreements which may conflict or differ from the terms of this Agreement. Where a subject covered by the provisions of this Project Labor Agreement is also covered by the Collective Bargaining Agreement which serves as the basis for the attached Schedule A or B, the provisions of this Project Labor Agreement shall prevail. Where a subject is covered by the provisions of Schedule A and not covered by the Project Labor Agreement, the Schedule A provisions shall prevail.

(b) Any dispute as to the applicable source, between this Agreement and a Schedule A or B, for determining the wages, hours and working conditions of employees on the Project shall be resolved by [*same as Article II, Section 9*]. It is understood that this Agreement, together with the referenced Schedule A's and B's, constitutes a self-contained, stand alone, Agreement and that by virtue of having become bound to this Project Labor Agreement, the Contractor will not be obligated to sign any other Local, Area or National Agreement.

Section 4. This Agreement shall only be binding on the signatory parties hereto and shall not apply to the parents, affiliates, subsidiaries, or other ventures of any such party.

Section 5. This Agreement shall be limited to work historically recognized as construction work, including, specifically, the site preparation and related demolition work necessary to prepare the site for construction, and such rehabilitation of existing facilities as is directed by

the Authority. Nothing contained herein shall be construed to prohibit, restrict, or interfere with the performance of any other operation, work or function which may occur in or around the Project site or be associated with the development of the Project, or with the ongoing operations of the Massachusetts Water Resources Authority.

Section 6. Items specifically excluded from the scope of this Agreement include, but are not limited to, the following:

A. Work of non-manual employees, including but not limited to, superintendents, supervisors, staff engineers, surveyors (except where expressly covered by a current local Collective Bargaining Agreement which forms the basis for a Schedule A or B), inspectors, quality control personnel, quality assurance personnel, timekeepers, mail carriers, clerks, office workers, including messengers, guards, emergency medical and first aid technicians, and other professional, engineering, administrative, supervisory and management employees.

B. Equipment and machinery owned or controlled and operated by the Authority.

C. All off-site handling of materials, equipment or machinery and all deliveries to and from the Project site.

D. All employees of the Authority, and all employees of the Project Contractor or the Contractor not performing manual labor.

E. Any work performed on or near, or leading to or into, the Project site by state, county, city or other governmental bodies, or their Contractors; or by public utilities or their Contractors; and/or by the Authority, or its Contractors (for work which is not part of the Project).

F. Off-site maintenance on leased equipment and on-site supervision of such work.

G. Off-site warranty functions and warranty work, and on-site supervision of such work.

H. Exploratory geophysical testing and boring both on-land and off-shore, except where expressly covered by a current Collective Bargaining Agreement which forms the basis for a Schedule A or B.

I. Laboratory or specialty testing or inspections not ordinarily done by the crafts.

Section 7. None of the provisions of this Project Labor Agreement shall apply to the Massachusetts Water Resources Authority and nothing contained herein shall be construed to prohibit or restrict the Authority or its employees from performing work not covered by this Agreement on the Project site. As areas and systems of the Project are inspected and construction tested by the Project Contractor or Contractor and accepted by the Authority, the Agreement shall not have further force or effect on such items or areas, except when the Project Contractor or Contractor are directed by the Authority to engage in repairs, modifications, check-out, and/or warranty functions required by their contract(s) with the Authority.

Section 8. It is understood that the Authority, at its sole option, may terminate, delay and/or suspend any or all portions of the Project at any time.

Section 9. It is understood that the Project is under the continuing supervision of the United States District Court for the District of Massachusetts, and the parties recognize that adjustments in construction planning, processes, procedures, timing, or in the provisions of this Agreement may be necessitated by orders of the Court. To the extent that there are changes ordered by the Court which are, or appear to be, in conflict with this

Agreement, the parties will use their best efforts to resolve these issues, to the extent necessary with the assistance of the Court, but should they be unable to resolve the matter, the dispute or differences shall be referred to ————————, who shall hear and resolve the matter in a manner consistent with the orders of the Court and to the extent possible in the best interest of all parties involved, including specifically the Authority, the citizens of Massachusetts whom the Authority serves, and the Union and the employees it represents on the Project.

Section 10. It is understood that the liability of any Contractor and the liability of the separate Unions under this Agreement shall be several and not joint. The Unions agree that this Agreement does not have the effect of creating any joint employment status between or among the Authority, Project Contractor and/or any Contractor.

ARTICLE III

UNION RECOGNITION AND EMPLOYMENT

Section 1. The Contractor recognizes the Union as the sole and exclusive bargaining representative of all craft employees working on facilities within the scope of this Agreement.

Section 2. Applicants for various classifications covered by the Agreement required by the Contractor on the Project shall be referred to the Contractor by the Local Union. The Contractor shall have the right to determine the competency of all employees, the right to determine the number of employees required and shall have the sole responsibility for selecting the employees to be laid-off consistent with Article IV, Section 3 below. The Contractor shall also have the right to reject any applicant referred by the Local Union, subject to the show-up payments required in the applicable Schedule A or B.

Section 3. For a Local Union now having a job referral system in its Local Collective Bargaining Agree-

ment, for the purpose of initial employment only, the Contractor agrees to include such system in the appropriate Schedule A or B and it shall be used exclusively by the Contractor. Such job referral system must be operated in a non-discriminatory manner and in full compliance with Federal, state and local laws and regulations which require equal employment opportunities and non-discrimination, and referrals shall not be affected in any way by the rules, regulations, by-laws, constitutional provisions or any other aspects or obligations of union membership, policies or requirements and shall be subject to such other conditions as established in this Article.

Section 4. All employees covered by this Agreement shall be subject to the union security provisions contained in the applicable Schedule A's and B's.

Section 5. In the event that any Union is unable to fill any requisition for employees within a forty-eight (48) hour period after such requisition is made by the Contractor (Saturdays, Sundays and Holidays excepted) the Contractor may employ applicants from any other available source.

Section 6. In the event that the Local Union does not have a job referral system as set forth in Section 3 of this Article, the Contractor shall give the Local Union first preference to refer applicants, subject to the provisions of Section 5. The Contractor shall notify the Union of employees hired by any source other than referral by the Union.

Section 7. The Local Union shall not knowingly refer to a Contractor under this Agreement employees currently employed by another Contractor working under this Agreement.

Section 8. The Local Unions will exert their utmost efforts to recruit sufficient numbers of skilled craftsmen to fulfill the manpower requirements of the Contractor.

Section 9. The selection of craft foremen and/or general foremen and the number of foremen required shall be entirely the responsibility of the Contractor. It is understood that the procedure for selection of such foremen and/or general foremen may be affected by specific provisions of applicable Schedule A's or B's; and, further, that the contractor shall give primary consideration to qualified individuals within the jurisdiction of the Local Union (limited, where required by existing local Collective Bargaining Agreements, to those passing a required test). After giving such consideration, the Contractor may select such individuals from other geographic jurisdictions. All foremen shall take orders exclusively from the designated Contractor representatives. Craft foremen shall be designated as working foremen at the request of the Contractor, except when an existing local Collective Bargaining Agreement prohibits a foreman from working when the craftsmen he is leading exceed a specified number.

Section 10. Except as provided in Article IV, Section 3, individual seniority shall not be recognized or applied to employees working on the Project.

ARTICLE IV

UNION REPRESENTATION

Section 1. Authorized representatives of the Union shall have access to the Project, provided they do not interfere with the work of employees and further provided that such representatives fully comply with the posted visitor and security and safety rules of the Project.

Section 2. Stewards

(a) Each signatory Local Union shall have the right to designate a working journeyman as a steward, and shall notify the Contractor in writing of the identity of the designated steward prior to the assumption of his duties as steward. Such designated steward shall not exercise

any supervisory functions. There will be no non-working stewards. Stewards will receive the regular rate of pay of their respective crafts.

(b) In addition to his work as an employee, the steward shall have the right to receive, but not solicit, complaints or grievances and to discuss and assist in the adjustment of the same with the employee's appropriate supervisor. Each steward shall be concerned with the employees of the steward's contractor and, if applicable, subcontractors, and not with the employees of any other contractor. The Contractor will not discriminate against the steward in the proper performance of his Union duties.

(c) The stewards shall not have the right to determine when overtime shall be worked or who shall work overtime, except on the basis of a Schedule A or B which contains a procedure for establishing equitable distribution of overtime.

Section 3. The Contractor agrees to notify the appropriate Union twenty-four (24) hours prior to the layoff of a steward, except in the case of discipline or discharge for just cause. If a steward is protected against such layoff by the provisions of any Schedule A or B, such provisions shall be recognized to the extent that the steward possesses the necessary qualifications to perform the work remaining. In any case in which a steward is discharged or disciplined for just cause, the appropriate Union shall be notified immediately by the Contractor.

Section 4. On work where the Authority's personnel may be working in close proximity of the construction activities, the Union agrees that the Union representatives, stewards and individual workers will not interfere with the Authority's personnel or with the work which is being performed by the Authority's personnel.

ARTICLE V

MANAGEMENT'S RIGHTS

Section 1. The Contractor retains full and exclusive authority for the management of its operation. Except as expressly limited by other provisions of this Agreement, the Contractor retains the right to direct the workforce, including the hiring, promotion, transfer, lay-off, discipline or discharge for just cause of its employees; the selection of foremen; the assignment and schedule of work; the promulgation of reasonable work rules; and, the requirement of overtime work, the determination of when it shall be worked, and the number and identity of employees engaged for such work. No rules, customs, or practices which limit or restrict productivity, efficiency or the individual and/or joint working efforts of employees shall be permitted or observed. The Contractor may utilize any methods or techniques of construction.

Section 2. Except as otherwise expressly stated in this Agreement, there shall be no limitation or restriction upon the Contractor's choice of materials or design, nor, regardless of source or location, upon the full use and installation of equipment, machinery, package units, precast, pre-fabricated, pre-finished, or preassembled materials, tools, or other labor-saving devices. The Contractor may without restriction install or otherwise use materials, supplies or equipment regardless of their source according to the Schedule A's and B's or as customarily performed in this area. The on-site installation or application of such items shall be performed by the craft having jurisdiction over such work; provided, however, it is recognized that other personnel having special talents or qualifications may participate in the installation, check-off or testing of specialized or unusual equipment or facilities.

Section 3. Except as otherwise expressly stated in this Agreement, it is recognized that the use of new technol-

ogy, equipment, machinery, tools and/or labor-saving devices and methods of performing work will be initiated by the Contractor from time to time during the Project. The Union agrees that it will not in any way restrict the implementation of such new devices or work methods. If there is any disagreement between the Contractor and the Union concerning the manner or implementation of such device or method of work, the implementation shall proceed as directed by the Contractor, and the Union shall have the right to grieve and/or arbitrate the dispute as set forth in Article VII of this Agreement.

ARTICLE VI

WORK STOPPAGES AND LOCKOUTS

Section 1. There shall be no strike, picketing, work stoppages, slowdowns or other disruptive activity for any reason by the Union or employees against any Contractor covered under this Agreement, and there shall be no lockout by the Contractor. Failure of any Union or employee to cross any picket line established by any union, signatory or non-signatory, or any other organization, at or in proximity to the Project site is a violation of this Article.

Section 2. The Contractor may discharge any employee violating Section 1 above, and any such employee will not be eligible for referral under this Agreement for a period of ninety (90) working days from the date of his discharge. The Contractor and the Union shall take all steps necessary to obtain compliance with this Article and neither shall be held liable for conduct for which it is not responsible.

Section 3. If the Contractor contends that any Union has violated this Article, it will telegraph the International President(s) of the Local Union(s) involved advising him of the fact, with copies of such telegram to the President of the Local Union(s) involved, the Building Trades Council and the Department. The International

President or Presidents will immediately instruct, order and use the best efforts of his office to cause the Local Union or Unions to cease any violation of this Article. An International Union complying with this obligation shall not be liable for unauthorized acts of its Local Union.

Section 4. Any party, including the Project Contractor, may institute the following procedure, in lieu of or in addition to any other action at law or equity, when a breach of Section 1, above, is alleged:

a. A party invoking this procedure shall notify ———, whom the parties agree shall be the permanent arbitrator under this procedure. In the event that the permanent arbitrator is unavailable at any time, he shall appoint his alternate. Notice to the arbitrator shall be by the most expeditious means available, with notices by telegram to the party alleged to be in violation and to the Department and the Council if it is a Union alleged to be in violation.

b. Upon receipt of said notice, the arbitrator named above or his alternate shall sit and hold a hearing within twenty-four (24) hours if it is contended that the violation still exists, but not before twenty-four (24) hours after the telegraph notice to the International President(s) required by Section 3, above.

c. The arbitrator shall notify the parties by telegram of the place and time he has chosen for this hearing. Said hearing shall be completed in one session, which, with appropriate recesses at the arbitrator's discretion, shall not exceed 24 hours unless otherwise agreed upon by all parties. A failure of any party or parties to attend said hearings shall not delay the hearing of evidence or the issuance of any award by the arbitrator.

d. The sole issue at the hearing shall be whether or not a violation of Section 1, above, has in fact occurred, and the arbitrator shall have no authority to consider any matter in justification, explanation or mitigation of such violation or to award damages, which issue is reserved for court proceedings, if any. The Award shall be issued in writing within three (3) hours after the close of the hearing, and may be issued without an Opinion. If any party desires an Opinion, one shall be issued within fifteen (15) days, but its issuance shall not delay compliance with, or enforcement of, the Award. The arbitrator may order cessation of the violation of this Article and other appropriate relief, and such Award shall be served on all parties by hand or registered mail upon issuance.

e. Such Award may be enforced by any Court of competent jurisdiction upon the filing of this Agreement and all other relevant documents referred to hereinabove in the following manner. Telegraphic notice of the filing of such enforcement proceedings shall be given to the other party. In the proceeding to obtain a temporary order enforcing the arbitrator's Award as issued under Section 4(d) of this Article, all parties waive the right to a hearing and agree that such proceedings may be *ex parte*. Such Agreement does not waive any party's right to participate in a hearing for a final order of enforcement. The Court's order or orders enforcing the arbitrator's award shall be served on all parties by hand or by delivery to their last known address or by registered mail.

f. Any rights created by statute or law governing arbitration proceedings inconsistent with the above procedure or which interfere with compliance hereto are hereby waived by the parties to whom they accrue.

g. The fees and expenses of the arbitrator shall be equally divided between the moving party or parties and the party or parties respondent.

Section 5. Procedures contained in Article VII shall not be applicable to any alleged violation of this Article, with the single exception that any employee discharged for violation of Section 1, above, may resort to the procedures of Article VII to determine only if he was, in fact, engaged in that violation.

ARTICLE VII

DISPUTES AND GRIEVANCES

Section 1. This Agreement is intended to provide close cooperation between management and labor. The Project Contractor and The Building and Construction Trades Department and the Building and Construction Trades Council of the Metropolitan District shall each assign a representative to this Project for the purpose of assisting the International and Local Unions, together with the Contractor, to complete the construction of the Project economically, efficiently, continuously and without interruption, delays or work stoppages.

Section 2. The Contractor, Unions, and employees collectively and individually, realize the importance to all parties to maintain continuous and uninterrupted performance of the work of the Project, and agree to resolve disputes in accordance with the arbitration provisions set forth in this Article.

Section 3. Any question arising out of and during the term of this Agreement involving its interpretation and application (other than trade jurisdictional disputes or alleged violations of Article VI, Section 1) shall be considered a grievance and subject to resolution under the following procedures:

Step 1(a). When any employee subject to the provisions of this Agreement feels he is aggrieved by a

violation of this Agreement, he shall, through his Local Union business representative or job steward, within five (5) working days after the occurrence of the Violation, give notice to the work site representative of the involved Contractor stating the provision(s) alleged to have been violated. The business representative of the Local Union or the job steward and the work site representative of the involved Contractor shall meet and endeavor to adjust the matter within three (3) working days after timely notice has been given. If they fail to resolve the matter within the prescribed period, the grieving party, may, within forty-eight (48) hours thereafter, pursue Step 2 of the grievance procedure provided the grievance is reduced to writing, setting forth the relevant information concerning the alleged grievance, including a short description thereof, the date on which the grievance occurred, and the provision(s) of the Agreement alleged to have been violated. Grievances and disputes settled at Step 1 shall be non-precedential except as to the parties directly involved unless endorsed by the Project Contractor within five (5) days after resolution has been reached and the terms of the resolution are set forth in writing to the Project Contractor.

(b) Should the Local Union(s) or Project Contractor or any other Contractor have a dispute with the other party and, if after conferring, a settlement is not reached within three (3) working days, the dispute shall be reduced to writing and proceed to Step 2 in the same manner as outlined herein for the adjustment of an employee complaint.

Step 2. The Business Manager or his designee of the involved Local Union, together with the International Union representative of that Union, the site representative of the involved Contractor, and the labor relations representative of the Project Contrac-

tor shall meet within seven (7) working days of the referral of the dispute to this second step to arrive at a satisfactory settlement thereof. If the parties fail to reach an agreement, the dispute may be appealed in writing in accordance with the provisions of Step 3 within fourteenth (14) calendar days after the initial meeting at Step 2.

Step 3(a). If the grievance shall have been submitted but not adjusted under Step 2, either party may request, in writing, within fourteen (14) calendar days after the initial Step 2 meeting, that the grievance be submitted to an arbitrator selected from the panel pre-selected by the parties to this Agreement, or if the membership of a panel has yet to be agreed upon, by mutual agreement of the parties, but if they are unable to do so within fourteen (14) days after referral to them for arbitration, they shall request the American Arbitration Association to provide them with a list of arbitrators from which the arbitrator shall be selected. The rules of the American Arbitration Association shall govern the conduct of the arbitration hearing. The decision of the arbitrator shall be final and binding on all parties and the fee and expenses of such arbitrations shall be borne equally by the involved Contractor and the involved Union(s).

(b) Failure of the grieving party to adhere to the time limits established herein shall render the grievance null and void. The time limits established herein may be extended only by written consent of the parties involved at the particular step where the extension is agreed upon. The arbitrator shall have the authority to make decisions only on issues presented to him and he shall not have the authority to change, amend, add to or detract from any of the provisions of this Agreement.

Section 4. No adjustment or decision may provide retroactivity exceeding sixty (60) days prior to the date of the filing of a written grievance.

Section 5. The Project Contractor shall be notified by the involved contractor of all actions at Steps 2 and 3 and shall, upon its request, be permitted to participate in full in all proceedings at these steps.

ARTICLE VIII

JURISDICTIONAL DISPUTES

Section 1. There will be no strikes, work stoppages, slowdowns, or other disruptive activity arising out of any jurisdictional dispute. Pending the resolution of the dispute, the work shall continue uninterrupted as assigned by the Contractor.

Section 2(a). Building construction work shall be assigned by the Contractor in accordance with the procedural rules of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (hereinafter the "Plan").

(b). It is recognized by the parties that certain portions of the construction work covered by this Agreement (for example, tunnel, off-shore drilling, etc.) will not fall within the traditional definition of "building construction work" and shall be assigned by the Contractor in a manner consistent with the jurisdictional agreements, rules and practices applicable in the discipline involved.

Section 3. Any jurisdictional dispute over the Contractor's assignment of work shall be settled in accordance with one of the following procedures:

(a). Where all of the disputing parties involved are stipulated to the procedures of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry for disputes involving the building construction discipline, the dispute will be settled in accordance with the procedural

rules and decisions of that Plan and shall be binding upon the Contractor, except in such cases where all parties to the dispute are parties to a local plan recognized and approved by the Department in which event the dispute will be resolved in accordance with the procedures of that plan.

(b). Where all the disputing parties involved are stipulated to an agreed-upon method, approved by the Department, for resolving disputes in a discipline other than building construction work, a dispute involving work assigned under that discipline shall be resolved in accordance with the procedures of that agreed-upon method.

(c)(1). Where all parties are not bound to the same dispute resolution procedure, or where the dispute includes a difference among the parties over the appropriate body with jurisdiction to decide such dispute or in any other situation not covered in paragraph (a) or (b) of this Section, and if the dispute is not resolved among the parties within seven (7) days, it shall be referred by any one of the Unions or the involved Contractor, within five (5) days thereafter, to the International Unions with which the disputing Unions are affiliated. The International Unions and the involved Contractor shall meet promptly to resolve the dispute. Any resolution shall be reduced to writing and signed by representatives of the involved Contractor and the International Unions.

(c)(2). In the event that the respective International Unions of the disputing Locals and the involved Contractor are unable to resolve the dispute within thirty (30) days from the date of referral, the dispute shall be referred by any of the interested parties to ———— (or some other agreed upon neutral), who the parties agree shall be the permanent arbitrator under this Article to hear and decide issues arising from the work assignment which is the basis for the dispute. The parties agree that the said arbitrator shall, within twenty (20) days of such referral, conduct a hearing and render a determination

of the dispute. The fee and expenses of such hearing shall be shared equally by each Union and the involved Contractor.

(c)(3). In such hearing, the arbitrator shall first determine whether the work in dispute is covered by the appropriate discipline within which the work falls for purposes of jurisdictional assignment and whether there exists an agreed-upon method for the resolution of jurisdictional disputes in that discipline to which all parties to the dispute are bound. If the arbitrator determines an agreed-upon method exists to which all parties are bound, he shall refer the dispute to that procedure for resolution. In all other cases, the arbitrator shall proceed to resolve the dispute on the merits.

Section 4. Any award or resolution made pursuant to Section 3 shall be final and binding on the disputing Unions and the involved Contractor on this Project only, and may be enforced in any court of competent jurisdiction. Such award or resolution shall not establish a precedent on other construction work not covered by this Agreement. In all disputes under this Article, the Project Contractor shall be considered a party in interest.

Section 5. In making any determinations hereunder, there shall be no authority to assign work to a double crew, that is, to more employees than the minimum required to perform the work involved; nor to assign the work to employees who are not qualified to perform the work involved. This does not prohibit the establishment, with the agreement of the involved Contractor, of composite crews where more than one (1) employee is needed for the job. The aforesaid determinations shall decide only to whom the disputed work belongs.

Section 6. There shall be no work stoppage or interruption while any jurisdictional dispute is being resolved. The work shall proceed as assigned by the Contractor until finally resolved under the applicable procedure of

this Article. The award or resolution shall be confirmed in writing to the involved parties. There shall be no strike, work stoppage or interruption in protest of any such award or resolution.

ARTICLE IX

WAGES AND BENEFITS

Section 1. All employees covered by this Agreement shall be classified in accordance with work performed and paid the base hourly wage rates for those classifications as specified in the attached Schedule A's and B's. Recognizing, however, that special conditions may exist or occur on the Project, the parties, by mutual agreement may establish rates for one or more classifications which may differ from the Schedule A's. Parties to such agreements shall be the Project Contractor, the Department, the involved Local Union(s) and the involved International Union(s).

Section 2. The Contractor agrees to pay contributions to the established employee benefit funds in the amounts designated in the appropriate Schedule A; provided, however, that the Contractor and the Union agree that only such bona fide employee benefits as accrue to the direct benefit of the employee (such as pension and annuity, health and welfare, vacation, apprenticeship and training funds, etc.) shall be included in this requirement and paid by the Contractor on this Project. Bona fide jointly trusteed fringe benefit plans established or negotiated through collective bargaining during the life of this Agreement may be added.

The Contractor adopts and agrees to be bound by the written terms of the legally-established Trust Agreements specifying the detailed basis on which payments are to be made into, and benefits paid out of, such Trust Funds. The Contractor authorizes the parties to such Trust Agreements to appoint trustees and successor trust-

ees to administer the Trust Funds and hereby ratifies and accepts the Trustees so appointed as if made by the Contractor.

ARTICLE X

HOURS OF WORK, OVERTIME, SHIFTS AND HOLIDAYS

Section 1. Work week and Work day. The work week shall consist of forty hours Monday through Friday. The standard work day shall consist of eight hours of work between the hours of 8:00 A.M. and 4:30 P.M., with one half hour unpaid lunch to commence no earlier than 11:30 A.M. and no later than 12:30 P.M. The standard work day may be changed to 7:00 A.M.—3:30 P.M. or 7:30 A.M.—4:00 P.M. to accommodate job conditions on five days' notice from the project contractor, or less notice as is mutually agreed upon. Starting time shall commence and quitting time shall occur at the employee's change shack.

Section 2. Overtime. Overtime pay shall be established by reference to the applicable Schedule A or B. There will be no restriction upon the contractor's scheduling of overtime or the non-discriminatory designation of employees who shall be worked. There shall be no pyramiding of overtime pay under any circumstances.

Section 3. It shall not be a violation of this Agreement if the Contractor considers it necessary to suspend all or a portion of the job to protect the life and safety of an employee. In such cases, employees will be compensated only for the actual time worked; provided, however, that where the employer requests employees to remain at the site and available for work, the employees will be compensated for the standby time at their base hourly rate of pay.

Section 4. Shifts. Shift work will be performed in accordance with the currently existing Schedule A's and B's.

Section 5. Holidays. Recognized holidays on this Project shall be those in the local collective bargaining agreements in existence for the appropriate Local Unions on April 1, 1989. There shall be no change in the established holiday schedules, and the days upon which those holidays are celebrated, except by mutual agreement.

Section 6. Reporting Pay.

(a) Employees who report to the work location and who are not provided with work, for whatever reason, shall receive two (2) hours' pay at their regular straight time rate, unless personally notified not to report at least two (2) hours prior to the departure time of their Contractor-provided transportation, or the start of the shift, whichever is earlier. A general radio and television announcement procedure will be established by the Project Contractor and published in the Project work rules. Announcements will be made every 15 minutes. This procedure will apply only to cancellation of work caused by inclement weather. For purposes of work on Deer Island and this provision only, "work location" shall mean the departure point for Contractor-provided transportation.

(b) When employees have started working on a shift but have worked less than four (4) hours, then four (4) hours at the straight time rate shall be paid; if the employees have worked more than four (4) hours, then they will be paid for eight (8) hours of pay at the employees' straight time rate. For purposes of this provision only, "started work" on Deer Island shall mean arrival at the island by Contractor-provided transportation.

(c) When an employee has completed his scheduled shift and is "called out" to perform special work of a casual, incidental or irregular nature, he shall receive overtime pay for actual hours worked with a minimum guarantee of four (4) hours' pay at the employee's straight time rate.

(d) When an employee leaves the job or work location of his own volition or is discharged for cause or is not working as a result of the Contractor's invocation of Section 3 above, he shall be paid only for the actual time worked.

(e) In all cases, if the employee is reporting on a day on which a premium rate is paid, reporting pay shall be calculated at that rate.

Section 7. Timekeeping. The Contractor may utilize brassing systems to check employees in and out. Each employee must check himself in and out. The Contractor will provide adequate facilities for checking in and out in an expeditious manner.

Section 8. Meal Period. The Contractor will schedule a meal period of not more than one-half hours duration at the work location at approximately four hours into the scheduled shift, consistent with Section 1; provided, however that the Contractor may, for efficiency of the operation, establish a schedule which coordinates the meal periods of two or more crafts. If an employee is required to work through his meal period, he shall be compensated in a manner established in the applicable Schedule A or B.

ARTICLE XI

APPRENTICES

Section 1. Recognizing the need to maintain continuing supportive programs designed to develop adequate numbers of competent workers in the construction industry, the Contractor will employ apprentices in their respective crafts to perform such work as is within their capabilities which is customarily performed by the craft in which they are indentured. The Contractor may utilize apprentices and such other appropriate classifications as are contained in the applicable Schedule A or B, in a ratio not to exceed 25% of his work force by craft, unless

the applicable Schedule A provides for higher percentage. Apprentices and such other classifications as are appropriate shall be employed in a manner consistent with the provisions of the appropriate Schedule A or B.

Section 2. The parties recognize that the size and scope of the Boston Harbor Project, the number of craftsmen and others expected to be employed in order to complete the work in a timely fashion, and the extended period of time during which the construction will be underway, should provide significant employment opportunities for qualified residents of the areas served by the Authority. Equally important, the parties recognize that persons currently lacking the basic skills and qualifications to enter skilled apprenticeship programs will have the opportunity through such basic training programs as the Building Opportunities Program to obtain the requisite qualifications and be considered for employment on the Project. The parties will endeavor to support such Programs and employ participants and graduates of such Programs consistent with the hiring obligations of this Agreement and the needs of the Contractor for skilled and experienced craftsmen and apprentices.

ARTICLE XII

SAFETY, PROTECTION OF PERSON AND PROPERTY

Section 1. In accordance with the requirements of the Occupational Safety and Health Act, it shall be the exclusive responsibility of each Contractor on the job site to ensure safe working conditions for its employees and their compliance with any safety rules contained herein or established by the Contractor or Project Contractor, provided however, it is understood that the employees have an obligation as set forth in Section 2 below.

Section 2. Employees must use diligent care to perform their work in a safe manner and to protect them-

selves and the property of the Contractor or the Authority. Failure to do so will be grounds for discipline, including discharge.

Section 3. Employees covered by the terms of this Agreement shall at all times while in the employ of the Contractor be bound by the safety, security, and visitor rules as established by the Contractor and/or the Project Contractor in accordance with applicable State and Federal safety and health statutes and regulations. These rules will be published and posted in conspicuous places throughout the Project.

ARTICLE XIII

SECURITY OF MATERIAL, EQUIPMENT AND TOOLS

The inspection of incoming shipments of equipment, apparatus, machinery and construction materials of every kind shall be performed at the discretion of the Contractor by individuals of its choice. All employees shall comply with the security procedures established by the Authority, Project Contractor, and/or Contractor.

ARTICLE XIV

NO DISCRIMINATION

Section 1. The Contractor and Unions agree that they will not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin or age in any manner prohibited by law or regulation. It is recognized that special procedures may be established by joint agreement of the parties to this Agreement and governmental agencies for the training and employment of persons who have not previously qualified to be employed on construction projects of the type covered by this Agreement. The parties to this Agreement will make all good faith efforts to assist in

the proper implementation of such orders, regulations or agreements for the benefit of the population within the jurisdiction of the Authority.

Section 2. Any complaints regarding application of the provisions of Section 1 should be brought to the immediate attention of the involved Contractor for consideration and resolution.

Section 3. The use of the masculine or feminine gender in this Agreement shall be construed as including both genders.

ARTICLE XV

TRAVEL AND SUBSISTENCE

Section 1. Travel expenses, travel time, subsistence allowance and/or zone rates shall not be applicable to this Agreement except as follows:

It is recognized that, for work at certain locations on the site, special conditions and requirements exist under which all employees will be transported by Contractor-furnished transportation to the work location. Such transportation will either be by bus or water ferry to Deer Island or Nut Island. For the duration of the Contractor's work under this Agreement, employees required to utilize such Contractor-provided transportation shall receive an allowance equal to one-half hour's pay at their basic rate for each trip made, in addition to their pay for time worked. This allowance shall not be considered compensation for time worked, and shall not be paid to any employee who qualifies under Article X, Section 6 for any other pay for time not actually worked. At no time during the life of this Agreement will employees be charged for contractor provided parking or transportation.

Employees arriving at their work location after their normal starting time as the result of any delay in the scheduled arrival of Contractor-furnished transportation

shall be compensated from their normal starting time at the appropriate rate.

Employees whose Contractor provided transportation delivers them back to their assembly point at the end of their work day more than fifteen (15) minutes after their scheduled arrival time shall receive thereafter an additional allowance equal to pay at their regular straight time rate, in 15 minute increments, minus fringes, until the actual time of arrival.

Section 2. Workers shall be at their place of work at the starting time established by the Contractor and shall remain at their place of work performing their assigned functions under the supervision of the Contractor until quitting time. The parties reaffirm their policy of a fair day's work for a fair day's wage.

ARTICLE XVI

WORKING CONDITIONS

Section 1. There will be no rest periods, organized coffee breaks or other non-working time established during working hours. Individual coffee containers will be permitted at the employee's work location.

Section 2. The Project Contractor and/or Contractor shall establish such reasonable Project rules as each Project Contractor deems appropriate. These rules will be explained at the pre-job conference and posted at the Project site by the Contractor and may be amended thereafter as necessary. Failure to observe these rules and regulations by any employee shall be grounds for discipline, including discharge.

Section 3. Tools of the Trade. The welding/cutting torch and chain fall are tools of the trade having jurisdiction over the work performed. Employees using these tools shall perform any of the work of the trade. There shall be no restrictions on the emergency use of any tools or equipment by any qualified employee or on the use of

any tools or equipment for the performance of work within his jurisdiction, provided that the employee can safely use the tools and or equipment involved.

Section 4. Employees work under the supervision of the craft foreman or general foreman.

ARTICLE XVII

SAVINGS AND SEPARABILITY

Section 1. It is not the intention of either the Contractor or the Union parties to violate any laws governing the subject matter of this Agreement. The parties hereto agree that in the event any provisions of the Agreement are finally held or determined to be illegal or void as being in contravention of any applicable law, the remainder of the Agreement shall remain in full force and effect unless the part or parts so found to be void are wholly inseparable from the remaining portions of this Agreement. Further, the Contractor and Union agree that if and when any and all provisions of this Agreement are finally held or determined to be illegal or void by Court of competent jurisdiction, the parties will promptly enter into negotiations concerning the substance affected by such decision for the purpose of achieving conformity with the requirements of an applicable law and the intent of the parties hereto.

Section 2. This Article shall not be construed to waive the prohibitions of Article VI, and if the parties are unable to resolve their differences, the matter shall be referred to [*Same as Article II, Section 9*] for resolution.

ARTICLE XVIII

DURATION OF THE AGREEMENT

This Project Labor Agreement shall be effective May 22, 1989, and shall continue in effect for the duration of the Project construction work described in Article II

hereof. Construction of any phase, portion, section or segment of the Project shall be deemed complete when such phase, portion, section or segment has been turned over to the Authority and has received the final acceptance from the Authority's representative.

Schedule A's and B's attached to this Project Agreement shall continue in full force and effect until the Contractor and/or Union parties to the Collective Bargaining Agreements which are the basis for such Schedule A's and B's notify the Project Contractor of the mutually agreed upon changes in those provisions of such Agreements which are applicable to the Project, and their effective date(s), which shall become the effective date(s) under this Agreement.

The parties agree that any provisions negotiated into said collective bargaining agreements will not apply to work on this Project if such provisions are less favorable to the Contractor than those uniformly required of Contractors for construction work normally covered by those agreements; nor shall any provision be recognized or applied on this Project if it may be construed to apply exclusively or predominantly to work covered by this Project Agreement.

It is understood that the Project Contractor may cancel this Agreement upon sixty (60) days' notice as to any signatory Union which negotiates terms or conditions after the effective date of this Agreement for inclusion in a Collective Bargaining Agreement which forms the basis for a Schedule A, if the Project Contractor, in its sole and exclusive discretion, determines that such terms or provisions are damaging to the Project or the Authority's rate payers. However, it is further understood that any issue which the Project Contractor has submitted to arbitration under this Agreement will not be cause for exercise of this provision.

The Union agrees that there will be no strikes, work stoppages, sympathy actions, picketing, slowdowns or

other disruptive activity affecting the Project by any Union involved in the negotiation of such Local Collective Bargaining Agreements and the resulting Schedule A's, nor shall there be any lock-out on this Project affecting the Union during the course of such negotiations. Any disagreement between the parties over the incorporation into Schedule A of such provisions agreed upon in the negotiation of the Local Collective Bargaining Agreement which serves as the basis for the Schedule A shall be referred to the [*same as Article II, Section 9*] for resolution. In this Article and throughout this Agreement, references to "Schedule A's" includes, also, "Schedule B's".

In witness whereof the parties have caused this Agreement to be executed and effective as of the day and year above written.

For the Union	For the Project Contractor
/s/ John F. Simmons President, Building and Construction Trades Council of the Metropolitan District	/s/ K. W. Willis Project Manager, Kaiser Engineers, Inc.
/s/ Joseph W. [Illegible] Secretary-Treasurer Building Trades Council of the Metropolitan District	/s/ C. R. Fitzgerald Vice President, Kaiser Engineers, Inc.
/s/ Robert A. Georgine President, Building and Construction Trades Department, AFL-CIO	
/s/ Joseph F. Maloney Secretary-Treasurer, Building and Construction Trades Department, AFL-CIO	

APPENDIX J

MASSACHUSETTS WATER RESOURCES AUTHORITY

INSTRUCTIONS TO BIDDERS

* * * * *

SECTION 13—AWARD OF CONTRACT

13.1 The general contract will be awarded to the lowest responsible and eligible general bidder complying with the conditions and requirements provided in these Instructions, the bid forms and the other bid documents. A "responsible" bidder is a bidder demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by the contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of Section 44D of Massachusetts General Laws Chapter 149. An "eligible" bidder is a bidder who is able to meet the requirements for bidders set forth in Sections 44A through 44H of said Chapter 149 and not debarred from bidding under section 44C of said Chapter 149 or any other applicable law, and who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work. In the interests of such harmony and the long-term supply of skilled manpower, each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser Engineers, Inc., on behalf of the Massachusetts Water Resources Authority, and the Building and Construction Trades Council of the Metropolitan District and its affiliated local unions, Local 52, Bricklayers; Local 424, Carpenters; Local 133, Laborers; and the Building and

Construction Trades Department, AFL-CIO and its affiliated International Unions and their affiliated local unions, and will be bound by the provisions of that agreement in the same manner as any other provision of the contract. A copy of the agreement is attached and included as part of these Contract Documents. The attachments (Schedule A's and B's) are not attached to the Agreement but are incorporated by reference as if fully set forth. Copies of said schedules may be examined by the bidders at the address specified in the Advertisement for Bids where Documents may be obtained, and are available upon request; except that Schedule B's are applicable to and available for projects including tunnel work only.

APPENDIX K

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(e) and (f), provide:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producers, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.
>
> (f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an em-

ployer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment. will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.